Supreme Court, U.S.
FILED
041498 MAY 5 - 2005
OFFICE OF THE CLERK

No. 04-___

IN THE

Supreme Court of the United States

RICHARD P. HOBBS,

Petitioner,

v.

COUNTY OF WESTCHESTER AND MR. JOSEPH MONTALTO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether under the First Amendment restricting public speech based on the listeners' reaction to it, that is, on the basis of on whether it will influence them to congregate around the speaker, which requires an evaluation of the nature and substance of the speech, is *prima facie* content-based.

2. Whether under the First Amendment the potential that a speaker, who has previously been convicted of a sexual offense involving a minor, will attempt to subsequently take advantage of the positive impact his innocent public speech may have on children in order to subsequently molest or seduce them constitutes a "secondary effect" that justifies restricting that otherwise fully protected speech.

3. Whether under the First Amendment a prohibition against using props or equipment in connection with public speech to reduce the potential that the speaker will use the positive impact of the speech and props or equipment to seduce or molest children can be upheld under a "secondary effects" analysis when there is no evidence that the prohibition will deter or reduce such an alleged effect and under the ordinance at issue a speaker is fully free to engage in any form of public speech directed at children without props or equipment and is fully free to use the props or equipment in interacting with children in any manner that does not involve solicitations, performances, or demonstrations.

PARTIES TO PROCEEDINGS

All the parties to the proceeding below are listed in the caption.

Petitioner is an individual, petitioning the Court on his own behalf.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (App. 1a - 43a) is reported at 397 F.3d 133 (2d Cir. 2005). The opinion of the district court (App. 44a - 62a), which was appealed to the Second Circuit is reported at 2003 WL 21919882 (S.D.N.Y. Aug. 13, 2003). The original opinion of the district court (App. 63a - 88a) is reported at 2002 WL 31873462 (S.D.N.Y. Dec. 23, 2002).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on February 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides that the government shall make no law "abridging the freedom of speech." U.S. CONST. amend. I.

Executive Order 3-2003, issued by the County of Westchester on March 19, 2003, is reproduced at App. 89a - 93a.

STATEMENT

This case involves the construction of fundamental First Amendment principles that have a profound and recurring effect in determining what speech is protected by the First Amendment. Specifically, the Second Circuit Court of Appeals upheld a restriction on public speech contained in a county executive order: (1) on the basis of the court's finding that the restriction at issue is content-neutral, and (2) because of the alleged negative secondary effects of that speech, that is, on the grounds that the innocent speech at issue may later facilitate an attempt to commit a crime.

The Second Circuit's decision constitutes a stark and significant departure from the First Amendment analysis of these issues that has been carefully articulated and developed by this Court and the other circuit courts and creates three

identifiable broad conflicts. First, the Second Circuit's decision directly conflicts with numerous and long-standing decisions of this Court and other circuits in erroneously holding that restricting public speech on the basis of the listeners' reaction to it is content-neutral. Second, the Second Circuit's decision directly conflicts with a series of decisions of this Court and one other circuit court in erroneously holding that the government can restrict public speech that is entirely innocent by itself solely on the basis that the speaker may subsequently attempt to use the positive impact of the speech to facilitate future wrongful activity. Third, the Second Circuit's analysis of the secondary effects doctrine is erroneous and in conflict with numerous other circuits because it does not require the government to present any actual evidence that the secondary effects of such public speech will be deterred or reduced in some material way by the applicable restriction on public speech.

If allowed to stand, the decision will facilitate, encourage and sanction substantially increased and unjustified governmental restrictions on public speech.

1. The Present Case

Petitioner Richard P. Hobbs ("Hobbs") is a busker.[1] App. 2a. His performance, which is "a very unique form of interactive, improvisational comedy," involves the use of balloons and is directed to children. App. 5a. His performance also contains a broader political message that is directed to adults. App 4a - 5a. Hobbs instituted this action *pro se* to challenge on First Amendment grounds the refusal by the County of Westchester to permit him to perform his busking act at Playland Park, a large multi-purpose park with an amusement area owned by the County of Westchester,

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[1] The word "busk" means "to entertain by dancing, singing or reciting on the streets or in a public place." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 283 (2d ed. 1987).

based upon the County's blanket policy of prohibiting public speech at the park. App. 3a - 4a.

Over twenty years ago, Hobbs received two misdemeanor convictions involving the sexual abuse of minors. Specifically, Hobbs was convicted in New York on his plea of guilty to Sexual Abuse in the Second Degree, an A misdemeanor, in 1978 and was convicted after trial in Lycoming County Court, Williamsport, Pennsylvania, of Corruption of Minors, a misdemeanor in the first degree, in 1983. App. 11a. There have also been three other unsubstantiated allegations of sexual abuse against Hobbs, all of which were alleged to have occurred over twenty years ago.

In addition to relying upon its blanket prohibition of public speech in Playland Park, the County also attempted to use Hobbs' convictions as a basis to justify prohibiting him from engaging in public speech at the park. There is no evidence, in the record or otherwise, that Hobbs has committed, or attempted to commit, a sexual offense, or, indeed, any offense of any type or form, in the last twenty years.

The district court issued a December 23, 2002 Opinion and Order that the County of Westchester's policy of prohibiting Hobbs' busking act in all areas of Playland was unconstitutional and, in addition, that the County did not have a proper basis upon which to deny Hobbs from performing in the public areas at Playland Park based up his prior misdemeanor convictions. App. 87a. In a subsequent decision, the district court awarded Hobbs $2,500.00 in compensatory damages and determined the scope of the public areas within Playland Park. App. 50a, 62a.

In response to the district court's December 23, 2002 Opinion and Order, the County issued Executive Order 3-2003 (the "Executive Order") that contains a provision prohibiting Hobbs and others from engaging public speech at any County public park if the speaker had a prior conviction

of a sexual offense involving a minor, the speaker used "props and/or equipment" in connection with his or her performance, and the performance would entice a child to congregate around the speaker. App. 89a - 93a. This petition for *certiorari* challenges the constitutionality of that provision in the Executive Order.

2. The Executive Order

The Executive Order specifically applies "to all individuals seeking to obtain a permit to solicit, perform, demonstrate, or engage in similar conduct utilizing props and/or equipment on public property owned by the County that is considered to be a public forum." App. 90a, § II. The Executive Order contains a number of restrictions on an individual's ability to engage in public speech in County-owned public fora. In particular, the second paragraph of Section VI of the Executive Order is a prohibition (the "Prohibition"), which, in pertinent part, provides:

> no individual known to have been convicted of a sexual offense against a minor shall be permitted to obtain a permit if the solicitation, performance, demonstration or other similar activity would entice a child to congregate around that person since the granting of such a permit would involve an unreasonable risk to the safety and welfare of children.

App. 92a, § VI.

By the terms of the Executive Order, and as construed by the County of Westchester and the Second Circuit, this Prohibition only applies if the public speech at issue involves "props and/or equipment." App. 90a, § II; App. 31a. The Prohibition does not apply to public speech that involves props or equipment that would not entice a child to congregate. App. 34a.

The Prohibition is not directed at or limited to restricting speech that is actually utilized as part of a wrongful attempt to seduce or molest a child and the Prohibition does not deal with or have any affect on prohibitions and criminal

penalties directed at actual attempts by a person to commit such offenses. The sole basis for this Prohibition was that such public speech would "involve an unreasonable risk to the safety and welfare of children." App. 92a, § VI.

3. The District Court's Opinion and Order

Hobbs challenged the constitutionality of the Executive Order to the district court. On August 13, 2003, the district court held that all of the First Amendment restrictions contained in the Executive Order were unconstitutional with the exception of the Prohibition, which was severed from rest of Executive Order. App. 60a - 61a. With respect to the Prohibition, the district court held that it was a content-based restriction on public speech, and that it survived strict scrutiny because it was narrowly tailored to achieve a compelling state interest. App. 52a - 58a.

4. The Court of Appeals' Decision

On appeal, Hobbs argued, in part, that the Prohibition: (i) was a content-based prior restraint on public speech, (ii) was unconstitutional on its face and as applied to him, (iii) improperly restricted First Amendment rights in violation of the principles articulated by this Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and its prior holdings (*e.g.*, *Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenberg v. Ohio*, 395 U.S. 444 (1969); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684 (1959)), in that it prevents innocent public speech for the sole purpose of reducing the potential for criminal activity in the future, and (iv) lacked any significant efficacy in achieving its purported goal of protecting children.[2]

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[2] Other legal arguments and rulings contained in Hobbs' appeal to the Second Circuit and its subsequent decision are not discussed herein because they are not relevant to the issues in this petition.

The Court of Appeals for the Second Circuit affirmed the district court's Opinion and Order, holding that the Prohibition does not violate the protections afforded by the First Amendment, either on its face or as applied to Hobbs. App. 2a. The rationale of the Second Circuit's decision was different from that of the district court in that Second Circuit held that the Prohibition was content-neutral and survived intermediate scrutiny. App. 29a.

The Second Circuit held that the Prohibition was content-neutral for two different reasons. First, although the Second Circuit conceded that an applicant's proposed presentation will be examined to determine whether the public speech "is likely to attract a crowd of children," (App. 33a) it held that the Prohibition was content-neutral because it "does not impose the permit requirement on any person or group of persons on the basis of any particular viewpoint or topic" and because the Prohibition focuses only "on the means by which the speaker's message is to be delivered." App. 30a.

Second, the Second Circuit held that the Prohibition was content-neutral based on its determination that the restrictions contained in the Prohibition were aimed at the potentially harmful secondary effects of speech and were unrelated to the content of expression. App. 33a. The court held that the County could restrict First Amendment rights because the Prohibition is aimed at eliminating the potential that a person who was previously convicted of a sexual offense involving a minor would use the positive impact created by the speech involving props or equipment to facilitate a sexual offense against a child. *Id.* In so holding, however, the Second Circuit did not cite to any cases where a court has held that the fact that a public speaker might subsequently attempt to use innocent public speech to facilitate committing a crime in the future constitutes a sufficient "secondary effect" that can justify restricting public speech. In fact, the Second Circuit neither discussed nor distinguished this Court's decisions in *Free Speech Coalition*, *Hess*, *Brandenberg*, or *Carroll*.

Further, in analyzing the relationship between the Prohibition and the secondary effects of the speech, the court did not rely on any actual evidence as to the whether persons convicted of a sexual offense involving a minor have used public performances or demonstrations to engage in a future, undetermined, sexual offense involving a minor. Instead, it based its opinion regarding the purported secondary effects of public speech by individuals convicted of a sexual offense involving a minor, using "props and/or equipment," that may entice a child to congregate around the speaker, on general evidence (a study by the Department of Justice and a report of a psychologist submitted by the County to the district court) regarding the recidivism rates of sex offenders and their purported "dangerousness" as a class. App. 33a - 34a.

Apart from whether such evidence established the secondary effects of the public speech at issue, there was no actual evidence in the record establishing or indicating that the Prohibition would reduce or deter those secondary effects in any material way and the Second Circuit did not refer to any such purported evidence. The sole basis for its finding that the Prohibition would have any efficacy was that a prop may assist a speaker in enticing a child to observe more closely a particular public speech when the message (*e.g.*, the plight of homeless or government inefficiency) may not hold the attention of a child. App. 36a.

After finding that that the Prohibition was content-neutral, the Second Circuit then held that the Prohibition was narrowly tailored to further its purpose of protecting children, thus satisfying the intermediate scrutiny test. App. 29a. Accordingly, the Second Circuit held that that there was no constitutional impediment to the application of the Prohibition as applied to Hobbs or on its face.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted in this case because the decision of the Second Circuit erroneously conflicts in a broad, precedent-creating fashion with the controlling decisions of this Court and other circuit courts in analyzing the restriction of public speech under the First Amendment based on the notion that it is "content-neutral" and because of the alleged "secondary effects" of that speech. The decisions of this Court and the circuit courts on these important First Amendment issues at times involve uncertainty and internal disagreement as to certain aspects of the applicable principles and the requisite levels and nature of proof. *Compare City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002), *with City of Erie v. Pap's A.M.*, 529 U.S. 277, 299-301 (2000). The Second Circuit's decision does not stem from those differences or matters of nuance or fine distinctions; rather, it involves a categorical disregard of well established First Amendment principles of broad and recurring significance that all of the Justices of this Court have long agreed upon and that other circuit courts have appropriately followed.

The decision in this case constitutes a lengthy and purportedly comprehensive review and application of the First Amendment concepts of "content neutrality" and "secondary effects" by a prominent circuit court. If *certiorari* is not granted and the decision is not reversed it will provide significant apparent authority for municipalities, other governmental entities and lower courts to ignore controlling precedents of this Court and decisions of other circuits on basic doctrines of First Amendment jurisprudence that have frequent and far-ranging application and that have been painstakingly developed over decades.

I. The Court Below Erred And Created A Conflict With This Court And Other Circuits In Holding That Restricting Public Speech On The Basis Of The Listeners' Reaction To It Is Content-Neutral

First, the Second Circuit erred in holding that the County of Westchester's restriction on public speech at issue should be analyzed under the lesser intermediate scrutiny standard because it is content-neutral. As noted *supra* at 3-4, the restriction prohibits public speech involving the use of "props and/or equipment" by a person who has previously been convicted of a sexual offense involving a minor if that speech will tend to entice a child to congregate around the speaker. The court acknowledged the obvious, that application of that standard requires that the municipal official consider the content of the speech to determine if it would likely have such an impact on children. App. 33a. Nevertheless, the court based this aspect of its decision on the fact that the restriction was not based in any respect on the *viewpoint* of the speaker or the *subject matter* or *topic* being discussed. *Id.* That holding is clear error under the categorical decision of this Court in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), in which this Court held: "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth*, 505 U.S. at 134.

Other decisions of this Court reinforce the holding in *Forsyth*. *See United States v. Playboy Entm't Group*, 529 U.S. 803, 811-12 (2000). ("The overriding justification for the regulation is concern for the effect of the subject matter on [listeners] . . . This is the essence of content-based regulation."); *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("Regulations that focus on the direct impact of speech on its audience present a different situation [from a content-neutral one].")

The Second Circuit's erroneous ruling in this case also creates a direct conflict with the holdings of the Third Circuit Court of Appeals in *Saxe v. State College Area School*

District, 240 F.3d 200, 209 (3d Cir. 2001), and *U.S. Sound & Service, Inc. v. Township of Brick*, 126 F.3d 555, 559 (3d Cir. 1997), and the District of Columbia Circuit Court of Appeals in *Christian Knights v. District of Columbia*, 972 F.2d 365 (D.C. Cir. 1992), which correctly followed the decision of this Court in *Forsyth*. The Second Circuit did not attempt to distinguish or even discuss any of the prior holdings on this issue by this Court or the other circuit courts.

The finding that the ordinance at issue was *prima facie* content-neutral provided one basis for not applying a strict scrutiny analysis of it, but rather an intermediate scrutiny analysis. The choice of which standard to apply is an issue in most First Amendment cases and has critical effect and significance because most restrictions on First Amendment rights will not be upheld under a strict scrutiny analysis. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 200 (1992). Under a strict scrutiny standard a content-based speech regulation is presumptively invalid, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and will only be upheld if that presumption is overcome by a showing that the regulation is necessary to "promote a compelling [governmental] interest" and that the regulation is "the least restrictive means to further the articulated interest." *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Here, there has been no finding, no evidence, or even any claim that the Westchester County ordinance is the "least restrictive means" to further the asserted governmental interest.

Most importantly, if governmental bodies and lower courts are led by the Second Circuit's decision to believe that restrictions based on how a listener will react to speech will be held to be content-neutral, as the decision in this case broadly holds, they will be improperly incentivized to use such a basis for restriction of public speech even when the restriction is not justified under a strict scrutiny standard.

II. The Court Below Erred And Created A Conflict With This Court And Another Circuit In Holding That The Potential That A Speaker Will Take Advantage Of The Positive Impact Of Innocent Public Speech With Props Or Equipment To Subsequently Molest Or Seduce Children Is A Secondary Effect That Can Justify Restricting Public Speech

The Second Circuit also erred in alternatively holding that the speech restriction at issue was content-neutral under a line of "secondary effects" decisions of this Court because it was targeted at eliminating the potential that a person who was previously convicted of a sexual offense involving a minor would use the positive impression created by public speech involving props or equipment to facilitate a subsequent sexual offense against a child. The "secondary effects" cases provide for content-neutral analysis even if a restriction is *prima facie* content-based as long as the regulation of speech serves purposes unrelated to the control of expression and targets only potentially harmful secondary effects of the speech. The "secondary effects" cases relied upon by the Second Circuit were *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (secondary effect of adult theaters on neighborhood); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (secondary effect of excessive noise); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (secondary effect of nude dancing on public health, safety and welfare); *City of Los Angeles v Alameda Books, Inc.*, 535 U.S. 425 (2002) (secondary effects of adult multi-use establishments on crime rate).

Those decisions did not involve in any respect the use of the positive impact of innocent speech to possibly facilitate subsequent criminal behavior by the speaker and the Second Circuit did not cite to any cases that supported the proposition that the potential that a speaker might subsequently attempt to use the positive impact of his public speech to commit a crime constitutes a secondary effect justifying the restriction of that speech. The Second Circuit

effectively created a new First Amendment principle and in doing so ignored the controlling precedents.

This aspect of the court's decision in this case is in error, and directly conflicts with this Court's prior rulings and creates another conflict with another circuit court. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), this Court categorically held that the potential that otherwise protected speech might be used to entice children into immoral or offensive behavior does not constitute a secondary effect that can justify restrictions on speech. That case involved the issue of whether Congress could constitutionally proscribe as child pornography computer images that did not involve real children. In holding that so-called "virtual child pornography" could not constitutionally be prohibited, this Court rejected the argument that the possible use of speech by pedophiles to induce children to illicit sexual behavior could constitute a secondary effect under First Amendment analysis:

> There are many things innocent in themselves, however, such as cartoons, video games and candy that might be used for immoral purposes, but we would not expect those to be prohibited because they could be misused.

Free Speech Coalition, 535 U.S. at 251.

This Court emphasized that the alleged potential negative effect depended upon the independent decision of someone to commit a crime and not the speech itself:

> The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.
>
> * * *
>
> The evil in question depends upon the artist's unlawful conduct, conduct as defined as criminal quite apart from any link to the speech in question.

Id., 535 U.S. at 250, 252. None of the Justices who specially concurred or dissented in *Free Speech Coalition* expressed any disagreement with this aspect of this Court's holding.

It is important to note that, if anything, in *Free Speech Coalition* there was more of a basis to prohibit "virtual child pornography" than to restrict the speech at issue here because of the government's position in that case that the "virtual child pornography" itself might have a direct negative effect on children, totally aside from its alleged tendency to facilitate future wrongful acts by pedophiles. Here, there is no allegation that the restricted speech itself would in any way be directly harmful to children or anyone else.

This Court's holding in *Free Speech Coalition* did not create a new First Amendment principle. Rather, as noted in *Free Speech Coalition*, this Court had previously held in similar fashion that restrictions on public speech because of the possibility of future criminal acts without some proof of imminent lawless action cannot be justified:

> To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. See *Kingsley Int'l Pictures Corp.*, 360 U.S., at 689; see also *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it"). The government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time." *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (*per curiam*). The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*).

Id., 535 U.S. at 253.

This Court's decision in *Free Speech Coalition* affirmed the decision of the Ninth Circuit Court of Appeals in which that court noted that:

> Many innocent things can entice children into immoral or offensive behavior, but that reality does not constitute a constitutional power in the Congress to regulate otherwise innocent behavior.

Free Speech Coalition v. Reno, 198 F.3d 1083, 1094 n.7 (9th Cir. 1999). The decision in this case does not only create a conflict with the decision in *Free Speech Coalition*, the other prior decisions of this Court on this issue and the underlying Ninth Circuit decision. Earlier, the Ninth Circuit held in *Collins v. Jordan*, 110 F.3d 1363, 1371-72 (9th Cir. 1997), that the possibility that demonstrators engaged in public speech might subsequently engage in criminal activity could not constitute a proper basis to restrict or prohibit their public speech. The Second Circuit's holding in this case also squarely conflicts with that holding.

The Second Circuit's newly created principle, that innocent speech can be prohibited or restricted because the positive impact of it might subsequently be used by the speaker to facilitate criminal activity by the speaker, is central to the resolution of this case. The line of authorities on this issue culminating in the decision of this Court in *Free Speech Coalition* was prominently and at length discussed and developed in the briefing of this case before the Second Circuit. *See* discussion *supra* at 5. Nevertheless, in a 25-page opinion the court simply ignored the entire line of precedents on this issue.

The implications of the Second Circuit's decision in this case on this core aspect of the holding are enormous. Consistent with fundamental First Amendment principles and the prior precedents of this Court, the fact that someone may attempt to use the positive impact of entirely innocent public speech to subsequently commit a crime has not been

held to provide a basis for restricting such public speech in the absence of evidence of imminent lawlessness. The Second Circuit's decision in this case constitutes such a holding. While the ordinance in question only applies to previously convicted offenders, it constitutes a broad basis to restrict and prohibit entirely innocent public speech by any and all prior offenders, regardless of the nature, circumstances and timing of their prior offense, if in the opinion of a municipality the positive impact of such speech might be used to facilitate similar offenses in the future. There is no fair basis under the First Amendment or any prior holding of this Court or any of the other circuit courts to authorize and thus encourage such a wholesale curtailment of First Amendment protections.

III. The Court Below Erred In Ignoring The Requirement Correctly Imposed By Numerous Other Circuits That Under A "Secondary Effects" Analysis The Government Must Provide Actual Evidence That The "Secondary Effects" Will Be Deterred Or Reduced In Some Material Way By The Applicable Restriction On Public Speech

In holding that the restriction of public speech at issue in this case was justified under a secondary effects analysis the Second Circuit erred because it did not require, and the record does not contain, any actual evidence that prohibiting public presentations with props or equipment will have any effect on a prior sex offender who wishes to molest or seduce a child.[3]

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[3] Under a secondary effects analysis this Court and all circuit courts have uniformly held that there must be actual proof that the alleged secondary effects are real. *See, e.g., City of Renton,* 475 U.S. at 51-52. Here the only "evidence" of such alleged secondary effects was the evidence as to general recidivism of pedophiles that did not specifically relate to public presentations by former sex offenders. However, in this case this Court need not focus on whether that evidence was sufficient since as noted

This Court has made it clear that a governmental entity cannot justify a restriction on public speech simply by invoking the "secondary effects" doctrine without any relevant evidence supporting the application of the doctrine. *See, e.g., City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In applying a "secondary effects" analysis pursuant to those decisions and the other decisions of this Court framing the "secondary effects" doctrine, the circuit courts that have considered the issue have correctly held that under an intermediate scrutiny standard the governmental entity must provide actual evidence that the restriction on public speech will in fact actually combat and reduce the targeted secondary effects.[4] For example, in *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272 (10th Cir. 2002), the Tenth Circuit Court of Appeals reviewed a case which involved the secondary effects of nude dancing. In that case, one aspect of the restriction at issue was a prohibition of anyone under the age of 21 from being on the premises of a business offering live nude dancing. The court acknowledged the existence of negative secondary effects

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supra at 7, there was no evidence at all as to whether the restriction on speech at issue would reduce or deter the alleged secondary effects at issue.

[4] The decisions of this Court suggest that there must be evidence as to efficacy of a First Amendment restriction based on a "secondary effects" analysis, but the various plurality and concurring opinions are not entirely clear as to what is the applicable standard. *Compare City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002), *with City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000). In this instance there is no evidence that the Westchester County ordinance will deter or reduce attempts by prior sex offenders to seduce or molest children and under any evidentiary standard the ordinance is unconstitutional.

from the nude dancing, but held the restriction unconstitutional because the City had not provided actual evidence that established that the particular age restriction at issue would in fact combat or reduce such secondary effects. *See Essence, Inc.*, 285 F.3d at 1287-89.

Similarly, in *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002), the Fourth Circuit Court of Appeals emphasized:

> Intermediate scrutiny is not, however, a toothless standard. It requires the government to produce evidence that a challenged regulation "materially advances an important or substantial interest by redressing past harms or preventing future ones. These harms must be 'real, not merely conjectural,' and the regulation must 'alleviate these harms in a direct and material way.'"

Giovani Carandola, 303 F.3d at 515 (citations omitted). It held that the intent of the legislature to control alleged secondary effects did not control in the absence of real evidence. *Id.*

Still further, some courts have struck down licensing restrictions based on the lack of proof of efficacy of the restrictions. In *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000), the Seventh Circuit Court of Appeals held portions of a city ban unconstitutional because the city failed to conduct any study of the efficacy of preventing anyone convicted of a multitude of offenses, including "indecency with a child;" from receiving an operator's license and therefore "such a drastic measure cannot be justified here as narrowly tailored to resist noisome secondary effects." *Schultz*, 228 F.3d at 852-53 (citing *Genusa v. City of Peoria*, 619 F.2d 1203, 1219 (7th Cir. 1980) (striking down a liquor-license revocation for applicants with specified sex-related convictions)).

Other circuit courts have similarly required actual evidence that establishes that the applicable restriction on public speech will in fact reduce targeted secondary effects.

See, e.g., Phillips v. Borough of Keyport, 107 F.3d 164, 175 (3d Cir. 1996) (First Amendment requires some record support for an ordinance's amelioration of secondary effects. "To insist on less is to reduce the First Amendment to a charade in this area."); *Essence Videos, Inc. v. San Antonio*, 330 F.3d 288 (5th Cir. 2003) (First Amendment requires a demonstration that a challenged statute, at least to some degree, will be effective in combating secondary effects); *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 411-12 (7th Cir. 2004) (ordinance unconstitutional because evidence was lacking to support proposition that secondary effects would be reduced); *Peek-a-Boo Lounge of Bradenton v. Manatee County*, 337 F.3d 1251, 1269 (11th Cir. 2003) (County must demonstrate that ordinance furthers its substantial interest in preventing secondary effects associated with adult entertainment).

Here, even if one assumes that pedophiles do or will frequently attempt to use the favorable impression from a public presentation to facilitate subsequent sex offenses involving minors, there is no evidence, or even any common sense rationale, to conclude that the restriction at issue will have any effect at all on the activities of such individuals. Pursuant to the restriction at issue, as it has been interpreted by the County of Westchester and the Second Circuit Court of Appeals, anyone who has previously been convicted of a sexual offense against a minor and seeks to attempt to commit a future offense can engage in a public presentation that is specifically directed at children without any restriction as long as he does not use a prop or any equipment. App. 31a. For example, any speaker is fully free to perform as a clown and interact with children in a public performance under the ordinance at issue as long as he does not use props or equipment. *Id.* Similarly, that same individual can use props or equipment in interacting with or communicating with children in any way he wants as long as he is not involved in a public presentation. For example, he is fully free to use props and equipment, that is, he can display or

give balloons, money or any other objects of interest or value to children, as long as he does not do so in connection with a public solicitation, performance or demonstration.

In this case the Second Circuit ignored the issue of requiring actual evidence to establish that the ordinance at issue would in a real way reduce the alleged secondary effects at issue. The court simply accepted the assertion of Westchester County that prohibiting a prior offender from engaging in a public presentation with props or equipment will actually have an impact on a prior offender who wishes to engage in subsequent criminal acts directed against children. Other circuit courts have properly refused to accept such assertions without actual evidence. An "if they say so" standard is unacceptable. *See, e.g., R.V.S., L.L.C., supra*, 361 F.3d at 411. As this Court held in *Alameda Books*:

> This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance.

Alameda Books, 535 U.S. at 438.

Here, this is no data or evidence at all about public presentations with props or equipment and sexual offenses. The reasoning of the County is "shoddy." The rationale of the ordinance, that prohibiting public speech with props or equipment will reduce child seductions or molestations, conflicts with the fact that under the ordinance all public speech without props or equipment is fully permitted and full use of props or equipment without public speech is also permitted. Thus, in addition to a lack of evidence establishing or even indicating that the ordinance will be effective, the premise of it conflicts with common sense. There is no real life reason why or how the ordinance will have a meaningful effect in terms of actually reducing the ability of a prior offender who has made a decision to attempt to seduce or molest a child to do so.

Thus, given the fact that it required no evidence as to the effectiveness of the ordinance, the Second Circuit also erred in this aspect of its holding. Moreover, the decision upholding the Westchester County ordinance stands in direct conflict with the numerous decisions of other circuit courts in terms of what a municipality must prove to satisfy the intermediate scrutiny standard under a "secondary effects" First Amendment analysis.

Obviously, protection of children from sexual offenses is an important interest. However, that does not justify making anyone who was ever convicted of sexual offense involving a minor a "First Amendment outcast." *Fernandes v. Limmer*, 663 F.2d 619, 630 (5th Cir. 1981), *reh'g en banc denied*, 669 F.2d 729, *cert. dismissed*, 458 U.S. 1124 (1982). The carefully developed guiding First Amendment principles, which preserve critical free speech rights while properly protecting against imminent wrongdoing, cannot simply be ignored, even when dealing with prior sex offenders.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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May 5, 2005

APPENDIX

[Reported at 397 F.3d 133]

UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT

RICHARD P. HOBBS, ***Plaintiff-Appellant,***
v.
COUNTY OF WESTCHESTER and MR. MONTALTO,
Director of Playland Amusement Park,
Defendants-Appellees.

No. 03-7985

Argued: April 12, 2004
Decided: Feb. 7, 2005

Before: NEWMAN, KEARSE, and SOTOMAYOR, Circuit Judges.

Judge NEWMAN concurs in the majority opinion and in a separate concurring opinion.

KEARSE, Circuit Judge.

Plaintiff Richard P. Hobbs appeals from so much of a judgment of the United States District Court for the Southern District of New York, then-*Judge* John S. Martin, Jr., as upheld the constitutionality of a provision in an executive order of defendant Westchester County (the "County") prohibiting the issuance of a permit for solicitation, performance, or demonstration in a public forum to a person previously convicted of a sexual offense against a minor if the effect of the solicitation, performance, or demonstration would be to entice a child to congregate around that person, *see* Westchester County, N.Y., Laws of Westchester County, Executive Order No. 3-2003 ("Westchester County Executive Order No. 3-2003" or "Executive Order 3-2003"), § VI, para. 2 (2003). The district court held, *inter alia*, that the prohibition is a content-based restriction on speech but that it does not violate the First Amendment because it is narrowly tailored to the compelling state interest of protecting children from sexual predators. On appeal, Hobbs

contends principally (a) that the prohibition is not narrowly tailored and hence violates the First Amendment both on its face and as applied to him, and (b) that the prohibition's automatic disqualification of convicted sex offenders against minors from eligibility for permits violates the *Ex Post Facto* Clause. The County argues that the decision of the district court may be upheld on the grounds, *inter alia*, that the prohibition is content-neutral and nonpunitive. For the reasons that follow, we affirm.

I. BACKGROUND

Playland Park ("Playland") is a 279-acre recreational complex in Rye, New York, owned and operated by the County. The complex comprises (a) a pool, picnic areas and shelters, a miniature golf course, a beach, a boardwalk, a lake, an ice-skating rink, a museum, and a pier, and (b) in a separate walled-in area, an amusement section featuring rides, games, and concession stands. Entrance to the amusement park section is free, but there are charges for the rides, games, and concessions.

Hobbs describes himself as "a busker, a street performer, a balloon sculptor, an artist, a musician, a comedian, and public political speaker." (Complaint at 1.) *See also* Webster's Third New International Dictionary 303 (1976) (defining "busker" as "an itinerant entertainer"). This action involves Hobbs's desire to busk at Playland.

A. *Hobbs's First Application, Denied Based on County General Ordinance Number 2*

In a letter dated May 22, 2000, Hobbs wrote to defendant Joseph Montalto, Director of Playland, to "apply for whatever 'permit' " would be required, "if any," for Hobbs to "sit on a bench (or [his] own chair) along a popularly traveled promenade at Playland, and perform [his] act and create balloon sculptures in the free exercise of . . . free speech." (Letter from Hobbs to Montalto dated May 22, 2000 ("Hobbs Letter"), at 1.) The Hobbs Letter stated that Hobbs was

> an artist who performs a comical act and creates sculptures with Balloons. Members of the public hear my message and often support my artistic expression. Often when they do I give them my balloon sculptures. At other times, persons who value my sculptures offer me money for them, which I accept. These are activities that the courts have said are legal and do not constitute a commercial transaction that may be regulated by the government.

(*Id.*)

By letter dated May 26, 2000, Montalto denied Hobbs's request, viewing the Hobbs Letter as an application for a permit to allow soliciting. Montalto stated that Playland is not a public forum but an amusement facility operated by the County in its proprietary capacity; in that capacity, the County had authority "to adopt restrictive regulations on speech which are reasonable and not calculated to suppress expression because of disagreement with the speaker's view." (Letter from Montalto to Hobbs dated May 26, 2000 ("First County Letter"), at 1.) The letter stated that the County's

> General Ordinance Number 2, governing the use of County property provides in entirely neutral terms that: "No person shall solicit alms, subscriptions or contributions for any purpose." Laws of Westchester County, Section 712.51.

(First County Letter at 1.) This letter also stated that Playland had retained "strolling performers and puppeteers (who do not solicit contributions) to entertain its patrons," and that "[n]o other such performances are authorized at Playland." (*Id.*) The letter indicated that the Ordinance would be "vigorously enforced" against Hobbs. (*Id.*)

B. *The Present Action*

In an August 9, 2000 *pro se* complaint, Hobbs commenced the present action, alleging that the County's denial of his permit request violated his rights under the First

Amendment, *inter alia*, and principally requesting declaratory relief and "an injunction against the Westchester County *Police preventing them from arresting Plaintiff for doing street performing at Playland Park*" (Complaint at 2 (emphasis in original)), so that he might "perform his balloon sculpturing and comedy routines to entertain passers-by as a busker along a public way" (*id.* at 3). Hobbs later also sought compensatory and punitive damages.

In describing Hobbs's busking act, the complaint alleges, *inter alia*, that Hobbs is a performer who "gives his entertainment to the public and presents his message to them for the public to enjoy" and that "[t]he messages often have political value, and or social value" (*id.* at 6). Hobbs's political message "comment[s] on government inefficiency. *He is criticizing the Government.* He is criticizing the daffiness of some civil servant controlled governmental processes. His message is political and critical of the government." (*Id.* at 12 (emphasis in original).) Hobbs

> is amongst other things commemorating the historic event where George Washington and his troops were wintering at Valley Forge. Washington sent a request to congress then in York, Pa. They needed help but not money. Send him shoes, food, and supplies. The congress responded by blindly sending him money. It was of no help because the British had bought up everything in the area that might be needed for their troops. This speaks of how ridiculous things can get in our society from the indifference our form of government often allows.

(*Id.* at 13-14.)

The complaint alleges that Hobbs dresses almost like a homeless person (*see id.* at 13) and "keeps the 'homeless look' because it is also necessary to remind Americans on vacation enjoying the best of worlds that there are still those suffering homeless Americans out there. Some are veterans." (*Id.* at 14.) He also "promotes good will and honesty and obedience to parents and other valuable

messages. He promotes diversity and universal acceptance of others. He discourages prejudice and pride ...." (*Id.* at 23.)

Hobbs alleges that "[t]he balloon is a tool through which he conveys his message" (*id.* at 13), and that his performance is particularly attractive to children (*see id.* at 12-15). His act is

> a very unique form of interactive, improvisational comedy. It is art, which is created, in the very presence of the audience. The audience becomes a part of the show and the art. His particular form of *this art requires a very specific type of audience*. The performer-artist must mold and shape the dynamic audience and lead them into participating.

(*Id.* at 8 (emphasis in original).) Hobbs

> tells the children he is an expert with balloons. Then he tries to blow it up from the wrong side. The Children often realize his dilemma and try to offer suggestions to him about how he might be more successful. They try to tell him to blow the balloon up on the other end. The more helpful they are to him the more he misunderstands them and the more ridiculous are his attempts to accomplish his task. The more they help him the worse it all gets. This eventually starts the children laughing. That in turn usually gets the adults laughing.

(*Id.* at 12.) The balloon

> helps attract his audience and helps him relate to them. It creates a tie between those watching him and the artist. Now the artist would have to be a heel to have engaged the audience so greatly in the attempt to make the balloon sculpture and then just pop it or throw it away. Naturally the Balloon artist gives the balloon to a child.

(*Id.* at 13.)

The complaint also alleges that Hobbs's appearance repels adults but attracts children (*see id.* at 14). "Many parents gawk at [Hobbs] and try to avoid him," but

> [s]ome of the children think he might be "Santa Clause" [sic] in disguise. The children often and some adults see the artist in him and look for something unusual and entertaining to happen. The children often looking from their hearts and imaginations recognize the gentle nature of this person. The children interact with him and try to help him.

(*Id.*) Further, the children's attraction to Hobbs is enduring:

> Very many times parents come back the next day (when Plaintiff is in a tourist area where families have gone for a week vacation) and the parents come to the Plaintiff and apologize. They say "Gee. We did not think much of you or your antics. We were leery of you. But we now realize that you must be a really good artist. The only thing our children have done all day is ask us to bring them back so they could see you again tonight."
>
> . . . .
>
> There are others whose three or four year-olds sees [*sic*] the Plaintiff's show one time. The parents failed to see how interesting it is to them. Then the parent sees Plaintiff, a year or two later and says, "Gee, I didn't realize how effective you are as a communicator. Our child has talked about you almost every day for a year after he met you. He often asked if we could come and see you again.

(*Id.* at 14-15.) "[S]ome poor children . . . are fed emotionally or spiritually" by Hobbs's performance. (*Id.* at 24.)

The complaint also alleges that, in order to fund his act of giving his balloon sculptures to children, Hobbs needs to receive contributions from his audience. (*See, e.g.*, *id.* at 19-21.) "He must tell [the audience] that he is not paid to be there and that if they appreciate his show they might want to give to support it." (*Id.* at 16.)

C. *Hobbs's Second Application, Denied Based on New York State Correction Law § 752*

While the action was pending in the district court, the County learned that Hobbs was a repeat sex offender against minors; defendants amended their answer to the complaint to add that fact as a basis for denying Hobbs a permit to perform his busking act at Playland. They asserted that "as plaintiff has been convicted twice of crimes involving the sexual abuse of minors," "[d]efendants legally may refuse to issue a permit to plaintiff to perform his clown and balloon act at Playland, pursuant to New York State Correction Law § 752(1) and § 752(2)." (Second Amended Answer dated June 12, 2001, ¶ 47.) Those sections, which appear in Article 23-a of the Correction Law, provide, in pertinent part, that

> [n]o application for any license or employment, to which the provisions of this article are applicable, shall be denied by reason of the applicant's having been previously convicted of one or more criminal offenses . . . when such finding is based upon the fact that the applicant has previously been convicted of one or more criminal offenses, *unless*:
>
> *(1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought; or*
>
> *(2) the issuance of the license or the granting of the employment would involve an unreasonable risk . . . to the safety or welfare of specific individuals or the general public.*

N.Y. Correction Law, Art. 23-a, *§§* 752(1), (2) (McKinney 2003) (emphases added). Defendants later filed a further amended answer containing the following factual allegations in support of their invocation of these state-law sections:

> 49. Plaintiff has been convicted twice of crimes involving child molestation.

> 50. One of plaintiff's convictions involved molestation of a boy on a day when plaintiff was performing as a clown.
>
> 51. Defendants have learned that there are witnesses who will testify at the trial of this action that plaintiff molested other children who were not involved in plaintiff's prior convictions. . . .
>
> 53. Defendants believe that plaintiff's convictions for child molestation directly relate to the permit that he seeks to perform at Playland.
>
> 54. Defendants believe that plaintiff would pose a safety risk to the general public if he were to perform at Playland.

(Third Amended Answer dated February 4, 2002, ¶¶ 49-51, 53-54.)

In the meantime, Hobbs had again applied for a permit in 2001. Montalto wrote to Hobbs again denying a permit, stating that, in addition to relying on the County Ordinance cited in the First County Letter, Playland was denying Hobbs's request because his convictions for sex offenses against minors rendered him ineligible for a permit under state law:

> [Y]our request for a permit to perform at Playland is denied pursuant to New York State Correction Law §§ 752 and 753. You have been convicted of two crimes that bear a direct relationship to the permit you seek and the issuance of the permit would involve an unreasonable risk to the safety of the general public. Specifically, you were convicted of sexual abuse of a minor and corruption of a minor. Both offenses involved sexual contact with children.
>
> It is my understanding that you wish to perform as a clown for children and hand them balloons. Thus, the permit you seek has a direct relationship to the crimes for which you were convicted. In addition, your involvement

> in a situation where you would interact with children presents an unreasonable safety risk to the general public.

(Letter from Montalto to Hobbs dated July 25, 2001 ("Second County Letter"), at 1.) This letter stated that Montalto had taken into account the factors listed in N.Y. Correction Law § 753 (entitled "Factors to be considered concerning a previous criminal conviction"), and had concluded that Hobbs should be denied a permit in light of "the direct relationship between the crimes for which [Hobbs was] convicted and the permit sought, and the safety risk presented by [Hobbs's] interaction with children." (Second County Letter at 1.)

D. *The Parties' Cross-Motions for Partial Summary Judgment*

The parties cross-moved for partial summary judgment. Hobbs, by then represented by counsel, contended that he was entitled to judgment principally on the basis that all of Playland is a traditional public forum in which he has an absolute right, under the First Amendment, to perform.

Defendants contended (a) that they were entitled to judgment on the grounds, *inter alia*, that Playland in its entirety is a nonpublic forum because the County operates it in a proprietary capacity, and (b) that the state-law provisions authorizing the denial of an employment license to a convicted criminal where granting such license would "involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public," N.Y. Correction Law § 752(2), provided an independent basis for excluding Hobbs from performing in the park. In support of their summary judgment motion, defendants submitted, *inter alia*, court records that described Hobbs's prior conduct leading to his two convictions for molestation of children; affidavits attesting to Hobbs's molestation of two other children; and an affidavit and report by clinical psychologist and psychology professor Dr. David L. Pogge, who had regularly conducted evaluations of sex offenders at the

request of probation departments and courts, had evaluated approximately 600 such persons, and possessed "special expertise in the evaluation of sex offenders and the risk they present to the community" (Affidavit of David L. Pogge, Ph.D., dated April 26, 2002, 1).

In his affidavit, Dr. Pogge stated that "[s]exual offenders have a high rate of recidivism," and that "[c]ertain subgroups of sex offenders have a higher risk of reoffending." (*Id.* ¶ 2.) In his report attached to the affidavit, Dr. Pogge elaborated:

> While sexual offenders in general are believed to have a relatively high recidivism rate, there are a number of factors that have been identified in the scientific literature that predict increased risk to re-offend, and there are other factors that are known or generally believed to reduce an offender's risk of recidivism. *Factors that have been identified in the scientific literature on sexual offenders that increase risk of recidivism include*, but are not limited to, number of sexual offenses, number of other criminal offenses, non-sexual violence during a sexual offense, history of non-sexual violence, *the absence of a familial relationship between the offender and victim, offending against individuals who are strangers or little known to the offender, sexual offending against male victims. Offenders who are relatively young-that is, under the age of 25 at the time of their offense— have been found to be more likely to re-offend. Male offenders who have never been married or lived in a marital relationship with a partner for at least two years are also more likely to re-offend.* In addition, the available research suggests that offenders who manifest psychopathic or paranoid personality traits are more likely to re-offend. *Offenders who show deviant sexual arousal-particularly where there is evidence of pedophilic sexual interest, and most especially where there is evidence of homosexual pedophilic sexual interest—are also a significantly greater risk to re-offend.*

(Report of David L. Pogge, Ph.D., "Consultation Regarding Mr. Richard Hobbs" ("Pogge Report") at 4 (emphases added).)

The County presented evidence to support its contention that many of the above factors applied to Hobbs. Hobbs had been convicted of sexual offenses against minors twice; both involved his fondling the genital areas of young boys with whom he apparently had no familial relationship and little or no prior acquaintance. (*See, e.g., Commonwealth v. Hobbs*, No. 82-10,684, Court of Common Pleas, Lycoming County, Pa., Sentencing Transcript, March 8, 1983, at 19-20 (according to the New York State records of Hobbs's first conviction in 1978, as read into the record, without objection, by the judge who presided over Hobbs's trial and sentencing for his second conviction, Hobbs's 1978 conviction involved an 11-year-old boy who was walking along the street when he was "grabbed" by Hobbs, taken into an office, and fondled until he was able to break free and run for help); *id.* Trial Transcript, January 13-14, 1983, at 10-19 (the victim of the conduct leading to Hobbs's second conviction testified that he was 14 when he was introduced to Hobbs; on that day, Hobbs was to give a performance as a clown in another town and the victim was to help Hobbs in that act; Hobbs fondled him throughout the round-trip car ride and at locations in and near the other town).)

One of the two affidavits describing a molestation for which Hobbs had not been prosecuted was submitted by a man who stated that Hobbs had molested him when he was approximately 10 years old. That molestation was relatively contemporaneous with the conduct that led to Hobbs's 1983 conviction, and the affiant's father testified at Hobbs's trial. The other affidavit was submitted by a mother who stated that she had entered a room and found Hobbs fondling the genitals of her early-teen-age son; that incident occurred not long after Hobbs had completed the term of incarceration for his 1983 conviction.

Hobbs testified that he was 24 years old at the time of his first conviction in 1978. (*See* Deposition of Richard P. Hobbs at 87). As of the time of his deposition in this case in 2001, he had never been married. (*See id.* at 4.) He had never received any psychiatric treatment or been treated by a psychologist or a behavioral therapist. (*See, e.g., id.* at 121-22.)

Dr. Pogge stated that he had reviewed the above trial, sentencing, and deposition transcripts, as well as hundreds of pages of other materials concerning Hobbs, including numerous documents written by Hobbs. Although he did not meet Hobbs in person, Dr. Pogge also reviewed some 2 1/2 hours of Hobbs's own videotapes of his performances. (*See* Pogge Report at 1-3.) Dr. Pogge opined, "using a published actuarial algorithm," that certain of the facts described in the above transcripts—even without consideration of the victims' ages—

> would be sufficient to classify Mr. Hobbs as a Medium-to-High risk to re-offend and would predict a long term risk (*i.e.*, 15 years) of re-conviction for a sexual offense of 40%.

(*Id.* at 4.) And either the victims' ages, *i.e.*, "early-adolescent" and "pre-adolescent," or the fact that the victims were males "would further increase [Hobbs's] risk for future sexual offending." (*Id.* at 5.) Dr. Pogge noted that "no factors known to reduce [Hobbs's] risk for re-offending (e.g., successful completion of appropriate treatment) are present" and that as a whole, the available information "suggest[ed] that Mr. Hobbs may present a special risk of sexual assault to minors, especially male minors." (*Id.* at 7.) Dr. Pogge also opined that

> [i]f, through his performances at Rye Playland, Mr. Hobbs[ ] were able to successfully present himself to large numbers of children and their guardians as a harmless, entertaining, benevolent clown, he would then

> be in an excellent position to begin identifying, targeting and "grooming" future victims.

(*Id.* at 5.)

E. *The Ruling in* Hobbs I

In an Opinion and Order dated December 23, 2002, the district court denied both parties' summary judgment motions. *See Hobbs v. County of Westchester*, 2002 WL 31873462, at *12 (S.D.N.Y. Dec. 23, 2002) ("*Hobbs I* "). The court held that certain areas of Playland are public fora, that in those areas a total ban on solicitation could not stand, *see id.* at *8, and that "[t]o the extent that Plaintiff sought a permit to perform in a public forum area of Playland Park . . . he had a First Amendment right to do so, and did not need a permit," *id.* at *2:

> While the amusement area of Playland Park is not a public forum and the County can prohibit Plaintiff from performing there, other parts of the park, which are removed from the amusement area, are no different from other public parks, which have consistently been held to be public fora in which the exercise of First Amendment rights may not be prohibited.

Id. Noting that defendants "apparently relied" on Westchester County Regulation § 765.261, *Hobbs I*, 2002 WL 31873462, at *8, a permit-requirement provision applying New York Correction Law § 752, the district court concluded that the permit provision "cannot constitutionally be applied to preclude Plaintiff from performing his act in public forum areas within Playland Park," *Hobbs I*, 2002 WL 31873462, at *12.

As to the amusement section of Playland, however, the court found that that area

> has all of the earmarks of a nonpublic forum. That area is run by the County with the intent of making a profit, whether or not it actually has succeeded in generating a profit in any given year. Since it is the only government

> owned amusement park in the United States, it cannot be argued that amusement parks are traditional public fora.

Id. at *5 (footnote omitted). The court also noted that

> the amusement area is largely self-contained. It is surrounded by fences and gates, which, in most areas, create clear demarcations between the amusement area and the other areas within Playland Park, and it does not serve as a natural thoroughfare for persons walking from place to place either within Playland or between the surrounding parks, facilities, and nearby residential areas.

Id. "Pursuant to the same analysis," the court found

> that the picnic shelters, which are reserved for private use for parties and corporate events, the ice rink, Boardwalk Museum, pool, and miniature golf course are nonpublic for a .. . . Consequently, the County's restrictions on First Amendment expression are reasonable as applied to those areas.

Id. at *6.

The court concluded that the boardwalk, pier, paths, park, and unreserved picnic areas (as contrasted with the reserved picnic shelters) are, in fact, public fora:

> Since sidewalks, streets and parks are "quintessential" public fora, the government bears the burden of establishing why some or all of these paths, park areas and the boardwalk should be considered different, and should not be open for First Amendment expression by the public.

Id. at *7. The court noted that "the County ha[d] not distinguished between the amusement area, ice rink, miniature golf course, picnic shelters, boardwalk museum, beach, and pool on the one hand, and the park, pier, boardwalk and paths on the other." *Id.* It found that the County's restrictions on First Amendment activity in the public fora (the park, pier, boardwalk, paths, and unreserved picnic areas) did not survive strict scrutiny:

> [T]he County has not articulated a compelling state interest that makes such a restriction necessary. As the Second Circuit stated in *Loper*,
>
> > [i]t does not seem to us that any compelling state interest is served by excluding those who beg in a peaceful manner from communicating with their fellow citizens. Even if the state were considered to have a compelling interest in preventing the evils sometimes associated with begging, a statute that totally prohibits begging in all public places cannot be considered "narrowly tailored" to achieve that end.

Id. at *7-*8 (quoting *Loper v. New York City Police Department*, 999 F.2d 699, 705 (2d Cir. 1993)). The court concluded that

> Westchester County Law § 712.5[1] banning solicitation in any County park and regulation § 765.41, banning any and all solicitation anywhere in Playland Park, and the April 2002 permit application procedure, which states that "solicitation of any member of the Public is strictly forbidden at Playland," cannot withstand scrutiny and are unconstitutional as applied to the public forum areas within Playland.

Hobbs I, 2002 WL 31873462, at *8.

The court also held that the County's permitting scheme violated the First Amendment because "[i]t le[ft] the decision whether to grant or deny a permit to exercise First Amendment rights at any location within Playland Park in the discretion of the commissioner, who must determine, without clear standards, whether the activity at issue would 'substantially interfere with park use and enjoyment by the public.' " *Id.* at *9 (quoting Westchester County Regulation § 765.261(1) (2001)). The court further noted that

> the regulation . . . is not narrowly drawn to protect against a particular danger posed by a specific class of persons convicted of specific crimes. *It is not limited, for example, to the regulation of specific conduct by convicted*

> *pedophiles*, but rather gives the commissioner broad discretion to determine what classes of previously convicted persons should be generally prohibited from engaging in constitutionally protected speech. Moreover, the evaluation required by the standards set forth in these sections clearly involves an appraisal of subjective, content-based factors.

Hobbs I, 2002 WL 31873462, at *11 (emphasis added).

Having determined that the provisions of state and County law invoked by defendants could not bar solicitation in Playland's public areas, the court concluded that additional hearings were needed to resolve the "issues of fact remain[ing] as to the nature of specific areas within Playland Park." *Id.* at *12.

F. *Westchester County Executive Order No. 3-2003*

Prior to the resolution of the remaining issues, the County, reacting to the *Hobbs I* ruling that the existing laws were not sufficiently narrowly drawn, adopted a new permit policy. Acting through its County Executive in March 2003, the County issued the regulation that is at issue on this appeal, Westchester County Executive Order No. 3-2003 (the "Executive Order"), setting forth its permit policy. The Executive Order states in pertinent part as follows:

> EXECUTIVE ORDER NO. 3-2003
>
> WHEREAS, the County owns various facilities that are held in trust for the public and are considered to be public property for the enjoyment of adults and children alike; and
>
> WHEREAS, the public nature of certain County facilities mandates that the County allow individuals to exercise their First Amendment rights on said public property; and
>
> WHEREAS, the need for these restrictions is especially necessary when such First Amendment conduct that is

performed on public property may attract crowds and children; and

WHEREAS, the exercise of a single individual's right under the First Amendment should not infringe upon another individual's enjoyment relating to the use of County property. . . .

WESTCHESTER COUNTY PERMIT POLICY

I. *Purpose.*

This policy has been established to ensure reasonable restrictions on permits to solicit, perform, demonstrate or engage in other similar conduct utilizing props and/or equipment on Westchester County property that constitutes a public forum by limiting the time, place and manner of such activity in order to assure a safe and secure environment for the protection of the public at large.

II. *Application.*

This policy shall apply to all individuals seeking to obtain a permit to solicit, perform, demonstrate, or engage in similar conduct utilizing props and/or equipment on public property owned by the County that is considered to be a public forum. These restrictions are being imposed for the safety of the public at large and to ensure their enjoyment of the County facilities. *These restrictions are to be uniformly applied to all individuals regardless of the form of First Amendment expression and these restrictions shall not be utilized for the sole purpose of suppressing any individual's activity.*

III. *Designated Permit Zones.*

On County public property that is deemed to be a public forum, there shall be a predetermined, designated zone where solicitation, performance, demonstration or other similar conduct utilizing props and/or equipment may be conducted. This permit zone shall be located in an area which shall minimize congestion or the obstruction of

pathways, but shall also be situated in an area that is visible and accessible to the general public. . . .

VI. *Prohibition.*

[¶ 1] In accordance with guidelines set forth in Article 23-a of the New York State Correction Law, any individual seeking a permit that [sic] has been convicted of a crime may be denied a permit if it is determined that: (1) there is a direct relationship between the criminal offense and the specific permit being sought; or (2) if the issuance of the permit would involve an unreasonable risk to property or safety or welfare of the general public.

[¶ 2] Notwithstanding the aforementioned, *no individual known to have been convicted of a sexual offense against a minor shall be permitted to obtain a permit if the solicitation, performance, demonstration or other similar activity would entice a child to congregate around that person* since the granting of such a permit would involve an unreasonable risk to the safety and welfare of children. . . .

VIII. *Coordination of Efforts.*

The Department of Public Safety, the Department of Parks, Recreation and Conservation and any other appropriate County Department shall work together in order to properly administer and effectuate the provisions of this Executive Order, including but not limited to, coordinating with state and local law enforcement agencies to review the databases, as allowable under the law, that will assist in identifying known sexual offenders.

Westchester County Executive Order No. 3-2003, WHEREAS clauses 1-4, §§ I-III, VI, VIII (emphases added).

Hobbs attacked all of the provisions of the Executive Order. He challenged § VI as unconstitutionally vague, unconstitutional as applied to him, and violative of both the First Amendment and the *Ex Post Facto* Clause of the Constitution. He also argued that the second paragraph of

§ VI ("¶ 2" or the "Prohibition") lacks adequate procedural protections to prevent an erroneous deprivation of rights.

The district court heard argument on Hobbs's challenges to the constitutionality of Executive Order 3-2003. It also conducted evidentiary hearings as to, *inter alia*, the extent of the public forum areas within Playland and the damages suffered by Hobbs as a result of defendants' initial denials of a permit to Hobbs based solely on County laws that *Hobbs I* ruled unconstitutional.

G. *The Final Decision of the District Court:* Hobbs II

In an Opinion and Order dated August 13, 2003, the district court struck down § III of the Executive Order, which limited the public areas available for expressive activity by creating "Designated Permit Zones," *see Hobbs v. County of Westchester*, 2003 WL 21919882, at *8-*9 (S.D.N.Y. Aug. 13, 2003) ("*Hobbs II*"). The court upheld § VI, ¶ 2, however, stating that "[a]lthough Executive Order No. 3-2003 cannot stand consistently with the constitutional requirements stated" in *Hobbs I*, "the second paragraph of § VI can nevertheless be severed and enforced," *see id.* at *9.

First, the court held that ¶ 2 does not violate the *Ex Post Facto* Clause:

> Such a provision does not impose retroactive punishment in violation of the *Ex Post Facto* clause, provided that it is civil and non-punitive. . . .
>
> In making that determination, the first place to look is to the County's stated intent, [*Smith v. Doe*, 538 U.S. 84, 92-93, 123 S.Ct. 1140, 1147, 155 L.Ed.2d 164 (2003)], which clearly is to prevent "an unreasonable risk to the safety and welfare of children." Executive Order No. 3-2003, § VI, ¶ 2. Like in *Smith* and in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), "nothing on the face of the statute suggests that the legislation sought to create anything other than a civil . . . scheme designed to protect the public from harm." *Smith*, [538] U.S. at [93], 123 S.Ct. at 1147. Nor has Plaintiff

suggested that the ordinance has any purpose other than to keep Mr. Hobbs, and anyone else who has been convicted of sexual abuse of children, from performing an act in which they seek to interact with children in a County owned park.

In addition, in evaluating the constitutionality of the Prohibition, the Court must look to its effects in terms of whether, in its necessary operation, the restriction "has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Smith v. Doe*, [538] U.S. at [97], 123 S.Ct. at 1149. The Court concludes that with respect to all of these criteria, the provision clearly is civil and regulatory, rather than criminal.

Hobbs II, 2003 WL 21919882, at *5 (footnote omitted).

In contrast, the court concluded that ¶ 2 implicates First Amendment rights and is a content-based restriction on speech:

The second paragraph of § VI states that no permit will be granted to a person who has been convicted of a sexual offense against a minor if the "performance . . . would entice a child to congregate around that person." "This blanket suppression of an entire type of speech is a content-discriminating act." *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1091 (9th Cir. 1999), *aff'd*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).

Hobbs II, 2003 WL 21919882, at *6 n. 6. However, the court held that the Prohibition is not unconstitutional because it is narrowly tailored to meet a compelling state interest:

There can be no question that protecting children from sexual predators constitutes a compelling state interest. *Smith v. Doe*, [538] U.S. at [103- 04], 123 S.Ct. at 1153. *See also New York v. Ferber*, 458 U.S. 747, 757, 102 S.Ct.

3348, 3355, 73 L.Ed.2d 1113 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."). Moreover, the fact that the Prohibition creates a lifetime ban is reasonable in light of the recognition in the cases that "[t]he risk of recidivism posed by sex offenders is 'frightening and high,['"] and that "'contrary to conventional wisdom, most reoffenses do not occur within the first several years after release,' but may occur 'as late as 20 years following release.['"] *Smith v. Doe*, [538] U.S. at [103-04], 123 S.Ct. at 1153. Furthermore, as the Supreme Court stated in *Kansas v. Hendricks*, 521 U.S. 346, 360 & n. 3, 117 S.Ct. 2072, 2081 n. 3, 138 L.Ed.2d 501 (1997), "when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.['"]

The second paragraph of § VI also is narrowly tailored to "target and eliminate no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 2503, 101 L.Ed.2d 420 (1988); *Dae Woo Kim v. City of New York*, 774 F.Supp. 164, 170 [(S.D.N.Y.1991)]. The Prohibition meets this standard because it applies, by its terms, only to individuals who have been convicted of a sexual offense against a minor, and specifically prohibits only "solicitation, performance, demonstration or other similar activity [that] *would entice a child to congregate around* that person." (emphasis added). Thus, consistently with this Order, even a convicted pedophile is free to go to Playland Park, or any other Westchester County park, to distribute leaflets or speak publicly regarding matters of personal or public concern, provided his activities and speech are oriented toward adults and are not of a nature that would be likely to "entice a child to congregate around" him.

Finally, as required by *Turner v. FCC*, 512 U.S. 622, 664, 114 S.Ct. 2445, 2470, 129 L.Ed.2d 497 (1994), the

> Executive Order can, in fact, be expected to alleviate the harm at which it is aimed "in a direct and material way." The County's "zero tolerance" policy surely will prevent performances of the type it seeks to prohibit.

Hobbs II, 2003 WL 21919882, at *6-*7 (emphasis in original).

The court concluded that any requirement of procedural due process would be satisfied by New York's ordinary civil remedies:

> As stated in the December 23, 2002 Order [*Hobbs I*], such a provision also must offer procedural safeguards to Plaintiff and others who are denied the opportunity to perform at Playland pursuant to a county regulation enacted to protect children from pedophiles. Although the Executive Order contains no appeal procedure, Defendants' counsel represented to the Court at oral argument that review of an allegedly arbitrary and capricious decision regarding enforcement of this Prohibition, made without a reasonable basis in fact, would be subject to review pursuant to the provisions of New York CPLR Article 78. The availability of such a mechanism for appeal is adequate to satisfy this requirement.

Id. at *6.

Finally, the court concluded that ¶ 2 is not impermissibly vague:

> [A]s the Supreme Court stated in *Grayned[v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)], "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." 408 U.S. at 110, 92 S.Ct. at 2300. Moreover, it is a general rule of statutory construction that, absent a definition in the statute, courts construe words in their plain and ordinary sense. *Weinberg v. City of Chicago*, 310 F.3d 1029, 1042 (7th Cir. 2002). Applying this rule, the Court finds that the challenged language makes sufficiently clear

> that it prohibits all child-oriented performances, and thus satisfies the rule stated in *Roth v. United States*, 354 U.S. 476, 491, 77 S.Ct. 1304, 1312, 1 L.Ed.2d 1498 (1957), that "all that is required is that the language convey[ ] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Any possible over breadth or over definition by County officials of the "entice a child" provision can be cured through case-by-case analysis and review. *See New York v. Ferber*, 458 U.S. 747,[ ]773-74, 102 S.Ct. 3348, 3363-64, 73 L.Ed.2d 1113 (1982).

Hobbs II, 2003 WL 21919882, at *7 (footnote omitted).

However, the court found that prior to the issuance of Executive Order 3- 2003, and nearly two years before they learned of Hobbs's criminal history, defendants had denied Hobbs's application for a permit to perform his act at Playland "without any investigation and without offering any alternative venue, solely on the basis of Westchester County regulations that have been held unconstitutional.. . . Therefore, Mr. Montalto's denial of Mr. Hobbs' request cannot be justified by those convictions." *Id.* at *3. The court concluded that Hobbs was "entitled to damages for Defendants' violation of his constitutional rights," *id.*, based on an estimate of moneys he would have received if he had actually busked at Playland, *see id.* at *4.

Judgment was entered awarding Hobbs $2,500 in compensatory damages, but ruling that Montalto, in his individual capacity, was entitled to qualified immunity. The court explicitly denied Hobbs's request for punitive damages and implicitly denied his requests for other relief; and the case was closed.

H. *The Scope of the Present Appeal*

On this appeal, Hobbs challenges so much of the judgment as upheld the constitutionality of § VI, ¶ 2, of Executive Order 3-2003. Although his notice of appeal also stated that he was appealing from the ruling that upheld the

County's "ban on public speech within specified *non-public* areas within Playland" (Hobbs Notice of Appeal dated September 11, 2003 (emphasis added)), his brief on appeal contains no argument as to why that ruling was incorrect. Accordingly, we regard that challenge as abandoned. *See generally Otero v. Bridgeport Housing Authority*, 297 F.3d 142, 144 (2d Cir. 2002); *Day v. Morgenthau*, 909 F.2d 75, 76 (2d Cir. 1990); Fed. R. App. P. 28(a)(9).

Defendants have not cross-appealed to challenge any of the district court's rulings that were adverse to them.

II. THE FIRST AMENDMENT CONTENTIONS

While conceding that ensuring the well-being of children is a compelling governmental interest, Hobbs contends principally that § VI, ¶ 2, of Executive Order 3-2003 is a content-based prior restraint that violates the First Amendment on the grounds (a) that it is not "the least restrictive means necessary to achieve its goal" (Hobbs reply brief on appeal at 7) because it "applies to every person who has been convicted of a sexual offense involving a minor, without any individual analysis of the speaker" (*id.* at 6), (b) that it "lacks efficacy" (Hobbs brief on appeal at 31) because it does not bar his presence at Playland or any other County park, and (c) that it is, on its face, overly broad both as to the speech it prohibits and as to the persons restrained. Defendants, while arguing that the district court did not err in ruling that ¶ 2 met the strict-scrutiny test that is applicable to content-based restrictions, also contend that only an intermediate level of scrutiny was required because the Prohibition is content-neutral. We conclude that ¶ 2 is content-neutral and survives intermediate scrutiny.

A. *The Focus of Executive Order 3-2003*

The pertinent Clause of the First Amendment, which applies to the states through the Fourteenth Amendment, *see Thornhill v. Alabama*, 310 U.S. 88, 95, 60 S.Ct. 736, 84 L.Ed. 1093 (1940), provides that "Congress shall make no law... abridging the freedom of speech ...." U.S. Const.

amend. I. "[S]peech" may include expressive conduct, *see, e.g., Texas v. Johnson*, 491 U.S. 397, 404-06, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), and certain principles governing the application of this First Amendment prohibition are well established.

The government's authority to regulate speech or expressive conduct on property that has traditionally been open to the public for such activity, such as public streets and parks, is sharply circumscribed. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992); *United States v. Kokinda*, 497 U.S. 720, 726, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (plurality opinion); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). A "prior restraint[ ]" on speech, *i.e.*, any regulation that "g[i]ve[s] public officials the power to deny use of a forum in advance of actual expression," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552-53, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), such as a requirement that a permit be obtained in advance of the proposed speech or conduct, see, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. at 130, 112 S.Ct. 2395, is "not unconstitutional per se," but it "bear[s] a heavy presumption against its constitutional validity," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. at 558, 95 S.Ct. 1239 (internal quotation marks omitted).

Restraints on speech on the basis of its content, except in a few limited categories such as obscenity, defamation, and fighting words, are generally disallowed. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); *Cantwell v. Connecticut*, 310 U.S. 296,

309-11, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). "[T]he fundamental principle that underlies our concern about 'content-based' speech regulations," *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), is that the government is not permitted to " 'grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views,' " *id.* at 48-49, 106 S.Ct. 925 (quoting *Police Department of Chicago v. Mosley*, 408 U.S. at 96, 92 S.Ct. 2286). The concern is that if the government were able "to impose content-based burdens on speech," it could "effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. at 116, 112 S.Ct. 501; *see, e.g., Leathers v. Medlock*, 499 U.S. 439, 448-49, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991). Further, "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980); *Carey v. Brown*, 447 U.S. 455, 462 n. 6, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). In short, regulations of speech based on its content "are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. at 382, 112 S.Ct. 2538.

However, this presumption of invalidity can be overcome if the restriction passes a strict test. *See, e.g., Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (majority opinion) (content-based restrictions on political speech "must be subjected to the most exacting scrutiny"). Under the strict-scrutiny test, a content-based restriction may be upheld if the restriction serves a "compelling" governmental interest, "is necessary to serve the asserted [compelling] interest," *R.A.V. v. City of St. Paul*, 505 U.S. at 395, 112 S.Ct. 2538 (emphasis and brackets in R.A.V.) (internal quotation marks omitted), is precisely tailored to serve that interest, and is the least restrictive means readily

available for that purpose, *see, e.g., Ashcroft v. American Civil Liberties Union*, ___ U.S. ___, ___, 124 S.Ct. 2783, 2791, 159 L.Ed.2d 690 (2004); *Boos v. Barry*, 485 U.S. at 321, 329, 108 S.Ct. 1157 (majority opinion).

In contrast, a less stringent test—applying "intermediate scrutiny"— is applicable to regulations of expressive activity that are not based on content. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality opinion); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 n. 6, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Content-neutral regulations may limit the time, place, or manner of expression—whether oral, written, or symbolized by conduct—even in a public forum, so long as the restrictions are "reasonable," are "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. at 293, 104 S.Ct. 3065; *see, e.g., Ward v. Rock Against Racism*, 491 U.S. at 791, 109 S.Ct. 2746; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 47, 106 S.Ct. 925. Although a restriction that is content-neutral must be "narrowly tailored" to serve the governmental interest, "it need not be the least restrictive or least intrusive means of doing so." *Ward v. Rock Against Racism*, 491 U.S. at 798, 109 S.Ct. 2746; *see, e.g., id.* n. 6 ("While time, place, or manner regulations must . . . be 'narrowly tailored' in order to survive First Amendment challenge, we have never applied strict scrutiny in this context. As a result, the same degree of tailoring is not required of these regulations, and least-restrictive-alternative analysis is wholly out of place."). The "narrow tailoring" requirement "is satisfied so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *Id.* at 799, 109 S.Ct. 2746 (internal quotation marks omitted).

In the analysis of whether a regulation is content-based or content-neutral, the "principal inquiry ..., in speech cases

generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* at 791, 109 S.Ct. 2746; *see, e.g., Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. at 116; *Leathers v. Medlock*, 499 U.S. at 448, 111 S.Ct. 1438; *FCC v. League of Women Voters of California*, 468 U.S. 364, 383-84, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984). "Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.' " *Ward v. Rock Against Racism*, 491 U.S. at 791, 109 S.Ct. 2746 (emphasis omitted) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. at 293, 104 S.Ct. 3065); *see, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 48, 106 S.Ct. 925.

"A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. at 791, 109 S.Ct. 2746; *see, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 47-48, 106 S.Ct. 925. Thus, a regulation that targets only potentially harmful secondary effects of speech, rather than the contents of the speech itself or the listener's agreement or disagreement with those contents, is deemed content-neutral. *See, e.g., City of Erie v. Pap's A.M., TDBA "Kandyland"*, 529 U.S. 277, 291, 296, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion); *id.* at 291, 120 S.Ct. 1382 (plurality opinion) (ordinance prohibiting public nudity and thus nude dancing was "not [an] attempt to regulate the primary effects of the expression, *i.e.*, the effect on the audience of watching nude erotic dancing, but rather [targeted] the *secondary effects, such as the impacts on public health, safety, and welfare*." is content-neutral (emphasis added)); *id.* at 296, 120 S.Ct. 1382 (plurality opinion) ("Erie's asserted interest in combating the negative secondary effects associated with adult entertainment establishments like Kandyland is unrelated to the

suppression of the erotic message conveyed by nude dancing."). A restriction designed to serve a governmental "need to protect the security" of the audience targets the speech's secondary, rather than its primary, effect. *Boos v. Barry*, 485 U.S. at 321, 108 S.Ct. 1157 (plurality opinion).

Finally, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must also provide "narrow, objective, and definite standards to guide the licensing authority" in acting on the permit application. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); *see, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. at 130-31, 112 S.Ct. 2395; *Niemotko v. Maryland*, 340 U.S. 268, 271-72, 71 S.Ct. 328, 95 L.Ed. 280 (1951).

Application of these principles in the present case leads us to the conclusion that Westchester County Executive Order No. 3-2003 survives constitutional scrutiny because the County has the requisite interest in the welfare of children, the permit requirement is content-neutral, and this content-neutral requirement serves the governmental interest and is narrowly tailored to serve that interest. And, as discussed in Part II.C. below, the Executive Order provides County officials with sufficient guidance to prevent arbitrary denials of permit applications.

First, it is indisputable and undisputed that a significant and substantial governmental interest is at stake. The government has "a *compelling* interest in protecting the physical and psychological well-being of minors," *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (emphasis added), indeed, an interest "of surpassing importance," in preventing the sexual exploitation of children, *New York v. Ferber*, 458 U.S. 747, 757, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). (*See* Hobbs brief on appeal at 15 ("there is no dispute that ensuring the well-being of children is a compelling governmental interest"; *id.* at 25 (same).)

Second, the Executive Order, whose pertinent provisions are set out in Part I.F. above, is content-neutral. Although it deals with speech or expressive conduct to the extent that the activity constitutes "solicit[ation]," perform[ance]," "demonstrat[ion]" or "other similar conduct," e.g., Westchester County Executive Order No. 3-2003, §§ I, II, VI-activity that we will refer to collectively as "presentations"—the Executive Order does not impose the permit requirement on any person or group of persons on the basis of any particular viewpoint or any particular topic. Without discriminating on the basis of content, the Executive Order focuses first—and potentially only—on the means by which the speaker's message is to be delivered. The "*Application*" section states that "[t]his policy shall apply to all individuals seeking to obtain a permit to solicit, perform, demonstrate, or engage in similar conduct *utilizing props and/or equipment* on public property owned by the County that is considered to be a public forum." *Id.* § II (emphasis added); *see also id.* § I (similarly referring to the use of "props and/or equipment" in connection with the description of the "*Purpose*" of the permit requirement). There is no indication in the Executive Order that a permit is required of any person who does not use "props and/or equipment." Accordingly, in the district court, the County repeatedly noted the "props and/or equipment" limitation on the applicability of its permit requirement. For example, in an April 2003 memorandum, the County stated that "[t]he language of the [Executive] Order is limited and specific; it applies . . . *only* to a 'solicitation, performance or demonstration . . . *utilizing props and/or equipment' (and not, for example to hand billing or hand billing and advocating verbally*) . . . ." (Defendants' Post-Hearing Memorandum of Law dated April 17, 2003, at 8 (emphases added).) In a June 2003 memorandum, the County stated that "Executive Order 3-2003 applies only to individuals who seek to engage in a very limited class of expressive activities (to wit, persons who seek to 'solicit, perform,

demonstrate, or engage in similar conduct . . . ") *and even then, only when those activities involve the use of 'props and/or equipment'*." (Defendants' Memorandum of Law Regarding Issues Raised at the June 2, 2003 Hearing, dated June 16, 2003, at 2 (emphasis added).) And at a later hearing on Hobbs's challenges to the Executive Order, when the court asked for confirmation that, if the speaker "just dressed as a clown and did a funny act[,] . . . made funny faces, [and] mimed," attracting people to congregate, but used no props, "that is not prohibited," the County responded, "That is correct." (Hearing Transcript, June 20, 2003, at 18.)

Although the phrase "props and/or equipment" does not appear in § VI of the Executive Order, and the district court analyzed the Prohibition as if it were applicable irrespective of whether a speaker sought to use props or other equipment, see *Hobbs II*, 2003 WL 21919882, at *9 n. 8, we think it more appropriate to view the Executive Order as setting forth an integrated permit scheme. Both § II, *i.e.*, the "*Application*" section that describes the broad class of individuals to whom "[t]his policy shall apply," and § VI, *i.e.*, the "*Prohibition* " section that describes how the policy is to be applied to one category of applicants, appear in the Part headed "WESTCHESTER COUNTY PERMIT POLICY," and we regard § II as an integral part of the Prohibition stated in § VI. The Executive Order does not by its terms extend to a person who wishes to convey his or her message, whatever that message may be, without the use of physical articles or equipment as theatrical aids. As we read the Executive Order, therefore, and as it is expressly interpreted by the County itself, a person not seeking to use props and/or equipment need not apply for a permit.

Hobbs, according to his complaint, seeks to deliver to the public various "messages [that] often have political value, and or social value." (Complaint at 6.) His political messages "comment[ ] on government inefficiency. *He is criticizing the Government.* He is criticizing the daffiness of some civil servant controlled governmental processes. His message is

political and critical of the government." (*Id.* at 12 (emphasis in original).) He apparently illustrates his point by, *inter alia*, referring to government inefficiency in responding to requests by General George Washington during the Revolutionary War. (*See id.* at 13-14.) Hobbs also seeks to remind the public of the plight of the homeless, including homeless veterans of the military. (*See id.*) And he "promotes good will and honesty and obedience to parents," "promotes diversity and universal acceptance of others," and "discourages prejudice and pride." (*Id.* at 23.)

Nothing in the Executive Order prevents Hobbs from communicating his criticisms of the government and his other social commentary—or from providing entertainment—in words or expressive action. As just discussed, the Executive Order affects only the manner of presentation through the use of props and/or equipment. Although Hobbs alleges that "[t]he balloon is a tool through which he conveys his message" (Complaint at 13), plainly such a prop is not integral to political or social-conscience messages, and nothing prevents Hobbs from delivering his messages or entertaining without that prop.

Further, the goal of the Executive Order's Prohibition plainly is to protect the safety and welfare of children using public property. At the outset, the Executive Order notes the use of such areas by children, *see, e.g.*, Westchester County Executive Order No. 3-2003, WHEREAS clauses 1 & 3; the "*Application*" section states generally that the "restrictions are being imposed for the safety of the public," *id.* § II; and the "*Prohibition*" section states expressly that its ban on the issuance of permits to persons known to have been convicted of sex offenses against minors, where the presentation would entice children to congregate around such known sex offenders, is meant to prevent "unreasonable risk[s] to the safety and welfare of children," *id.* § VI.

In providing that no permit will be granted where the applicant is "*known to have been convicted of a sexual*

offense against a minor . . . if the [presentation] *would entice a child to congregate around that person*," *id.* (emphases added), the Prohibition is not concerned with the content of the message, or the audience's agreement or disagreement with the message, or the audience's enjoyment of the presentation. By focusing on prop-assisted presentations that would entice a child to congregate around a person known to have been convicted of a sexual offense against a minor, the Prohibition looks beyond primary effects such as mere enjoyment of the presentation. Rather, it focuses on the safety of children and aims to limit the opportunity for such a convicted sexual offender to attract children with whom he might later engage in child molestation. The Prohibition thus targets effects that are secondary.

To be sure, the content of the applicant's proposed presentation can be examined—along with the proposed props and/or other equipment—to determine whether the presentation is likely to attract a crowd of children. But the specific content of the speech—whether the speaker is talking about animals, fairy tales, government inefficiency, or the plight of homeless veterans—is irrelevant to the governmental goal that a person with a criminal record of sexual offenses against minors not be permitted to use artifices to entice children to gather around him, developing rapport with the children and gaining new opportunities for child molestation. We conclude that the Executive Order constitutes a restriction only on the manner of speech and is designed to prevent harmful secondary effects unrelated to its content.

We are unpersuaded by Hobbs's contentions that the Prohibition is neither necessary nor narrowly tailored for the achievement of its purpose. As to necessity, it cannot reasonably be disputed that there exists a need for concern for the welfare of children in the presence of persons who have committed sexual offenses against minors. The Supreme Court in *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), for example, which was decided a

few days before the issuance of Executive Order 3-2003, discussed "the high rate of recidivism among convicted sex offenders and their dangerousness as a class," 538 U.S. at 103, 123 S.Ct. 1140, and quoted a 1997 United States Department of Justice report which noted that "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault," *id.* (internal quotation marks omitted). Further, before issuing the Executive Order, the County had sought the advice of Dr. Pogge, whose report discussed the "relatively high recidivism rate" of sexual offenders in general and the even higher rate for persons whose offenses were either homosexual or pedophilic (Pogge Report at 4). It is permissible for a municipality to conclude that secondary-effects-oriented regulations are necessary based on evidence such as this, which "is reasonably believed to be relevant to the secondary effects that they seek to address." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. at 442, 122 S.Ct. 1728 (plurality opinion) (internal quotation marks omitted); *see, e.g., City of Erie v. Pap's A.M., TDBA "Kandyland"*, 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion) ("in terms of demonstrating that such secondary effects pose a threat, the city need not 'conduct new studies' . . . 'so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses'") (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 51-52, 106 S.Ct. 925).

Finally, the Prohibition is narrowly tailored to further its purpose. It applies only to certain persons known to have been convicted of a sexual offense against a minor, and the Executive Order expressly requires County officials to work closely with law enforcement agencies in order to determine whether a given applicant is such a person, see Westchester County Executive Order No. 3-2003, § VIII. Given the high rate of recidivism by convicted child molesters and the facts, *inter alia*, that (a) the permit requirement does not apply to persons whose presentations would not use props and/or

equipment, and (b) the Prohibition (i) does not apply to a person who is merely suspected or who has been accused but not convicted of being a sexual offender against a minor, and (ii) does not apply, even as to a person known to have been convicted of a sex offense against a minor, if the planned presentation, even with props and/or equipment, would not entice a child to congregate around that person, we conclude that the Prohibition is a manner-of-presentation restriction that is narrowly tailored to further the County's compelling interest in the safety and welfare of children.

B. *Application of the Prohibition to Hobbs*

We see no constitutional impediment to the application of the Executive Order's Prohibition to Hobbs. Notwithstanding his complaint's description of the contents of his messages as political and social-issue oriented, his performances are expressly directed toward children. Several photographs introduced at a hearing in the district court show Hobbs on the Playland boardwalk, seated in a chair with various equipment at his side and a sign reading, in part, "A theater experience for 3 and 4 year olds." (*See* Hearing Transcript, April 3, 2003, at 21, 37; Defendants' Exhibit 3.) In one of the pictures, Hobbs is performing and displaying balloon sculptures. In his complaint, Hobbs alleges, *inter alia*, that "[t]he balloon is a tool through which he conveys his message" and "helps attract his audience" (Complaint at 13); that, although adults are repelled, his performance is particularly attractive to children, who try to help him understand how to inflate a balloon (*see id.* at 12-15); that his performance is "interactive" (*id.* at 8); that the balloon "creates a tie between [himself and] those watching him" (*id.* at 13); and that he hands balloons to children (*see id.*). Further, the complaint indicates that the desire of the children to congregate around Hobbs is long-lasting, as, after seeing Hobbs's act once, they repeatedly ask when they can go to see Hobbs again. (*See id.* at 14- 15.) It is undisputed that Hobbs had twice been convicted of child molestation offenses, and his own descriptions of his act compel the

conclusion that his act, using props, would entice children to congregate around him.

Finally, we reject Hobbs's contention that the Prohibition should be invalidated on the ground that it "lacks efficacy" (Hobbs brief on appeal at 31) because it does not bar his presence at Playland or any other County park. His presence indeed is not barred, nor is the mere expression of his views. *See, e.g., Hobbs II*, 2003 WL 21919882, at *6 ("[E]ven a convicted pedophile is free to go to Playland Park, or any other Westchester County park, to distribute leaflets or speak publicly regarding matters of personal or public concern, provided his activities and speech are oriented toward adults and are not of a nature that would be likely to 'entice a child to congregate around' him."). But Hobbs and other persons convicted of sexual offenses against minors need not be banned from public property entirely in order for the Prohibition to achieve at least some of the desired effect. The efficacy of the Prohibition lies in its limitation on Hobbs's ability to entice children to come near him through the use of equipment such as the balloons he seeks to hand them—accoutrements seemingly necessary to enhance the attraction, given that the contents of the messages Hobbs alleges he delivers (*e.g.*, tolerance, the plight of the homeless, government inefficiency) seem unlikely to hold the attention of a child. The governmental goal of limiting opportunities for child molestation by one previously convicted of a sexual offense against a minor would be achieved less effectively absent the Prohibition. Hobbs's "efficacy" challenge is thus meritless and instead simply confirms that there are other means by which Hobbs can deliver his messages.

We conclude that the Executive Order is content-neutral, aimed only at promoting the safety and well-being of children; it imposes a reasonable limitation on the manner of expression, without reference to content; and it is narrowly tailored to, and does, address the concededly compelling

governmental interest. As applied to Hobbs, it does not violate the First Amendment.

C. *Hobbs's Facial Challenge to ¶ 2*

Hobbs also contends that the Prohibition is "facially unconstitutional" because it is "substantially overbroad" in that it "prevents an entire class of people from engaging in public speech under any and all circumstances and throughout all public areas in Westchester County." (Hobbs brief on appeal at 34-35.) He argues that the Prohibition is invalid because (a) it automatically disqualifies all persons convicted of a sexual offense against a minor "without any individual assessment as to their risk of recidivism in general or specifically with respect to minors who would see and listen to their performances, demonstrations or similar activities" (*id.* at 35); (b) "almost any performance or demonstration in a public area, regardless of its substance or whom it is directed at, would likely 'entice a child to congregate around' . . . the speaker" (*id.* at 40); and (c) ¶ 2 thus "gives unbridled discretion to a County employee" to discriminate against a permit applicant on the basis of viewpoint (*id.* at 41). We disagree.

It is established that the courts may, as "an exception to ordinary standing requirements," *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988), entertain a claim that a law, even if constitutional as applied to the claimant, is so broad that it "may inhibit the constitutionally protected speech of third parties," *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). However, that exception is narrow. "Invalidating any rule on the basis of its hypothetical application to situations not before the Court is 'strong medicine' to be applied 'sparingly and only as a last resort.'" *FCC v. Pacifica Foundation*, 438 U.S. 726, 743, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (plurality opinion) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908,

37 L.Ed.2d 830 (1973)). Invalidation of Executive Order 3-2003 on the ground of overbreadth is not warranted here.

As discussed in Part II.A. above, the Prohibition in § VI, ¶ 2, is narrowly tailored to the County's compelling interest in protecting children from sexual predation. Contrary to Hobbs's assertion, the Prohibition does not "prevent [ ] an entire class of people from engaging in public speech under any and all circumstances" (Hobbs brief on appeal at 34-35). The circumstances encompassed by the Prohibition are, as discussed above, narrowly circumscribed. Hobbs's contention that a fully rehabilitated person who had been convicted 20 years ago of a misdemeanor sexual offense would not be permitted "to give a public speech on the dangers of pedophilia" (*id.* at 38) simply ignores the scope of the Executive Order. We would agree that if Hobbs were to give such a speech in conjunction with his self-styled "theater experience for 3 and 4 year olds" (Defendants' Exhibit 3), accompanied by the balloon sculptures that his complaint alleges attract children to him, his presentation would be within the scope of ¶ 2. But if given without props and/or equipment, such a speech-or any speech on any topic from any viewpoint—is beyond the scope of the Executive Order, and no permit is required.

Nor does the Prohibition apply to "an entire class of people" (Hobbs brief on appeal at 34). Rather, it applies only to members of a group that generally has a high rate of recidivism and poses a threat to the safety and welfare of children, *i.e.*, persons known to have been convicted of a sexual offense against a minor, and it does not apply to all such persons. Within the class of persons known to have been convicted of a sexual offense against a minor, the Executive Order itself does not apply if the person will not use props or other such equipment in his presentation; and the Prohibition in the Executive Order does not apply if the presentation is not likely to entice children to gather around him.

The framing of the Prohibition in terms of the category of persons whom the County has ascertained have been convicted of a sexual offense against a minor is not unreasonable. We reject Hobbs's suggestion that the County must instead undertake an "individual assessment" of the likelihood of recidivism by each such permit applicant (*id.* at 35). The imposition of that additional requirement, thereby necessitating substantial expenditures of time and resources for, *inter alia*, face-to-face psychiatric evaluation sessions by professionals, would not be reasonable. *Cf. United States v. American Library Ass'n*, 539 U.S. 194, 208, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003) (plurality opinion) (libraries may permissibly employ internet filtering software to "exclude certain categories of [potentially inappropriate] content, without making individualized judgments").

Finally, we are not persuaded that the Executive Order gives the County's licensing officials unbridled discretion to deny a permit application. First, the permit requirement does not apply unless props and/or equipment would be used. Second, if such aids would be used, the "*Prohibition*" section itself describes the factors that require denial of a permit. It does not authorize denial of the application unless the applicant is "known" to have been convicted of a sex offense against a minor. Thus, denial of a permit is not authorized on the basis of mere suspicions or unproven allegations of child molestation. Section VIII of the Executive Order requires County officials to coordinate with law enforcement agencies in order to learn whether an applicant has been so convicted. Further, the Prohibition requires the licensing official to determine whether the proposed presentation would "entice a child" to congregate around the applicant, a phrase that squarely focuses the official's attention on whether the proposed presentation is child-oriented. We reject Hobbs's contention that "almost any" presentation "would likely 'entice a child to congregate around' " the presenter (Hobbs brief on appeal at 40), although we agree that whether children are so enticed may well be unrelated to

the presentation's "substance" (*id.*). For example, the mere contents of the messages that Hobbs states he is conveying (*e.g.*, the plight of the homeless, government inefficiency) would hardly be likely to entice children to congregate. His presentation of those messages with props and/or equipment such as balloons, however, is plainly child-oriented; and, as his complaint asserts, children are attracted by the manner of his presentation. If an applicant sought to deliver a speech simply using, for example, placards of text, such a presentation would seem not to be one that would entice children to congregate. (*See, e.g.*, Defendants' Post-Hearing Memorandum of Law dated April 17, 2003, at 8 ("hand billing and[/or] advocating verbally" does not require a permit).)

We conclude that the Executive Order's statement in § II as to the scope of the County's permit policy, expressly limiting the policy's applicability to presentations using props and/or equipment, and the criteria set forth in § VI, ¶ 2, specifying that a permit is to be denied if (a) the applicant is a person known to have been convicted of a sexual offense against a minor and (b) the presentation would entice a child to congregate, provide sufficient guidance to County officials and do not allow them discretion to deny a permit on the basis of content or viewpoint. To the extent that a given applicant might in fact be denied a permit in connection with the planned use of props or equipment in a non-child-oriented type of presentation, that applicant ***157** would be free, as the district court concluded in *Hobbs II*, 2003 WL 21919882, at *6, to seek judicial review in an Article 78 proceeding, *see* N.Y. C.P.L.R. § 7801 *et seq.* (McKinney 1994), challenging ¶ 2 on the ground that it was unconstitutionally applied to him or her.

In sum, we conclude that Executive Order 3-2003 is not facially overbroad.

III. THE *EX POST FACTO* CHALLENGE

Hobbs also contends that the Prohibition in Executive Order 3-2003 amounts to further criminal punishment of previously convicted sex offenders and hence violates the *Ex Post Facto* Clause of the Constitution. Again, we disagree.

The *Ex Post Facto* Clause provides that "[n]o State shall . . . pass any . . . *ex post facto* Law," U.S. Const. art. I, § 10, cl. 1. Under this Clause, the government may not, *inter alia*, enact a law that punishes an act that was innocent prior to the enactment or a law that inflicts a greater punishment than was applicable to the crime when committed. *See, e.g., Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798). The *ex post facto* bar, however, is applicable only to "criminal punishments," and does not "include retrospective laws of a different character." *Kentucky Union Co. v. Kentucky*, 219 U.S. 140, 153, 31 S.Ct. 171, 55 L.Ed. 137 (1911); *see also Lynce v. Mathis*, 519 U.S. 433, 441, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997).

"[W]here unpleasant consequences are brought to bear upon an individual for prior conduct," the fundamental question "is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation." *De Veau v. Braisted*, 363 U.S. 144, 160, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960). The former would violate the *Ex Post Facto* Clause; the latter would not. *See, e.g., Lynce v. Mathis*, 519 U.S. at 445, 117 S.Ct. 891 (statute retroactively canceling former prisoner's earned provisional release credits, with which he had secured an early release, and requiring his return to prison, violated *Ex Post Facto* Clause by increasing punishment for crime); *De Veau v. Braisted*, 363 U.S. at 160, 80 S.Ct. 1146 (statutory ban against employment of convicted felons in jobs involving collection of union dues from various waterfront workers did not impose a criminal penalty); *Hawker v. New York*, 170 U.S. 189, 191-92, 18 S.Ct. 573, 42 L.Ed. 1002

(1898) (same for statutory ban against convicted felons' practice of medicine). In addressing the question of whether a penalty is "criminal," we analyze, *inter alia*, "whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Smith v. Doe*, 538 U.S. at 96-97, 123 S.Ct. 1140.

The Prohibition provision in Executive Order 3-2003 does not impose a criminal penalty. Requirements by municipalities that permits be obtained for demonstrations, parades, and other types of gatherings in public fora have long been required; but those requirements have not been in the nature of punishment. Nor does the Executive Order impose a significant "affirmative disability or restraint" on convicted pedophiles. It "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *Smith v. Doe*, 538 U.S. at 100, 123 S.Ct. 1140. And although the Executive Order's requirement that such a person apply for a permit in order to give a presentation using props and/or equipment might be considered an affirmative restraint, *see Smith v. Doe*, 538 U.S. at 101, 123 S.Ct. 1140, it plainly is not a restraint that is designed to be punitive, for the permit requirement for prop-assisted presentations applies to all applicants, whether or not they have been convicted of any crime. Moreover, the restraint is *de minimis* given that anyone, even a convicted pedophile, who wishes to engage in expressive activity without the use of props and/or equipment needs no permit.

Nor is the Prohibition's permit requirement intended to serve the traditional purposes of punishment, which include retribution, rehabilitation, prevention of further crimes by the defendant, and deterrence of the defendant and others who might contemplate committing similar crimes, *see generally* 1 W. LaFave, *Substantive Criminal Law* § 1.5(a) (2d ed.

2003). Although potentially related to deterrence and prevention, the stated purpose of the Executive Order is simply the protection of children. The relationship is not sufficient to make the Prohibition a criminal penalty, for "[t]o hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation," *Smith v. Doe*, 538 U.S. at 102, 123 S.Ct. 1140 (internal quotation marks omitted).

Finally, it is plain, as discussed in Part II.A. above, that the Prohibition against allowing convicted pedophiles to make prop-assisted presentations that would entice children to congregate around the pedophiles has a rational connection to the Executive Order's purpose. And given the limited application of the Executive Order, which does not impose the permitting requirement even on a person previously convicted of a sex crime against a minor if that person does not wish to use props and/or equipment in his presentation, we cannot conclude that the Executive Order is excessive with respect to its purpose.

In sum, we see no violation of the *Ex Post Facto* Clause.

CONCLUSION

We have considered all of Hobbs's contentions on this appeal and have found them to be without merit. For the reasons stated above, the judgment of the district court is affirmed.

JON O. NEWMAN, Circuit Judge, concurring.

I concur in Judge Kearse's comprehensive opinion, but am not entirely persuaded that the Appellees have effectively limited the application of their permit prohibition only to those convicted of a sexual offense against a minor *who use props* to entice children to congregate about them in the course of a performance. Even if the prohibition is not so limited, however, I see no valid First Amendment objection to its application to Appellant Hobbs, whether or not he uses props in the course of his performances.

[Reported at 2003 WL 21919882]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Richard P. HOBBS, *Plaintiff*,
v.
COUNTY OF WESTCHESTER, White Plains, New York, and Mr. Montalto, Director of Playland Amusement Park, Rye, New York, *Defendants*.

No. 00 Civ. 8170(JSM)

Aug. 13, 2003

OPINION & ORDER

MARTIN, J.

In an Opinion and Order dated December 23, 2002, the Court held that §§ 712.5, 765.41 and 765.261 of the Westchester County regulations could not constitutionally be applied to preclude Plaintiff from performing his busking act in public forum areas within Playland Park. Subsequently, the Court held hearings with respect to the extent of those public forum areas and regarding Plaintiff's damages. It also received additional submissions and heard oral argument with respect to the remaining issues in this case, including the claim that the case against Joseph Montalto, Director or Playland, must be dismissed pursuant to the doctrine of qualified immunity, and Plaintiff's challenge to the constitutionality of a newly adopted Executive Order, No. 3-2003. That Order purports to limit "solicitation, performance, demonstration or other similar conduct utilizing props and/or equipment" to "Designated Permit Zones" within "[c]ounty public property that is deemed to be a public forum." Executive Order No. 3-2003, dated March 19, 2003, § III. It also contains a "Prohibition" in § VI, which states:

> [N]o individual known to have been convicted of a sexual offense against a minor shall be permitted to obtain a permit if the solicitation, performance, demonstration or other similar activity would entice a child to congregate around that person since the granting of such a permit would involve an unreasonable risk to the safety and welfare of children.

Plaintiff has challenged § VI as unconstitutional as applied to him, and the entire Executive Order as over broad on its face.

I. *The Extent of the Public Forum*

As stated in this Court's Opinion and Order dated December 23, 2002, *Hobbs v. County of Westchester*, No. 00 Civ. 8170, 2002 U.S. Dist. LEXIS 24569, *10 (S.D.N.Y. Dec. 23, 2002), a public forum is a government owned setting of a type that traditionally has been available for public expression. As the Supreme Court stated in *Hague v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939):

> Streets and parks . . . have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.

307 U.S. at 516, 59 S.Ct. at 964.

On the other hand, a nonpublic forum is one that is not "by tradition or designation a forum for public communication." *Perry Educ. Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 46, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983). The Court previously held that the amusement area of Playland Park was a nonpublic forum which the County could "reserve . . . for its intended purposes" through reasonable viewpoint neutral restrictions on expression. 2002 U.S. Dist. LEXIS 24569, *14 (citing *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 811, 105 S.Ct. 3439, 3453, 87 L.Ed.2d

567 (1985)). While the Court held that at least some areas at Playland Park constituted public fora, fact issues regarding the characteristics and patterns of usage of those areas required a hearing before specific areas could be found to constitute public, as opposed to nonpublic fora.

The Court held such a hearing on April 3, 2003. Mr. Joseph Montalto, Director of Playland, testified regarding the physical layout, usage and traffic within the various areas of the Park. He stated that paid performers—jugglers, mimes, clowns, magicians, and costumed characters, as well as balloon salesmen, stroll the entire Park, and that the County views Playland Park as one undifferentiated family experience. Nevertheless, it is clear, as the Court held previously, that Playland is a mixed use facility, that certain areas and uses can be demarcated clearly from one another, and that there are significant areas outside the amusement area that have all of the characteristics of a traditional public forum. That the County historically has not permitted their use in that manner is not relevant to this determination. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1130 (10th Cir. 2002), *cert. denied*, 539 U.S. 941, 123 S.Ct. 2606, 156 L.Ed.2d 626 (2003) ("[Courts] have refused to attribute legal significance to an historical absence of speech activities where that non-speech history was created by the very restrictions at issue in the case.").

On the basis of the evidence presented, the Court finds that the pier[1] and the boardwalk, except for the area between

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[1] Mr. Montalto testified that at certain times the pier is closed off by gates. At those times, it constitutes a nonpublic forum. Moreover, it should be noted, as stated in the prior Opinion, that even within a public forum, reasonable regulations may be applied to limit the presence of performers and other speakers when their presence would implicate public safety and convenience due to congestion at particular times. *See Hobbs v. County of Westchester*, 2002 U.S. Dist. LEXIS 24569, *32 & n. 14 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 304, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940)). Thus, for example, the County could reasonably restrict the presence and activities of performers on the pier during a

the pool and the miniature golf course,[2] the path from the parking lot to the Edith Read Sanctuary (during the times that the gates between the parking lot and the path are open), and the public picnic area on the far side of the path to the Sanctuary all constitute public fora.[3] If individuals are allowed free exercise of their First Amendment rights within these areas, they will have ample access to patrons of Playland Park, with the exception of those who enter directly into and leave from the amusement area without entering any other areas of the Park.

The entire amusement area that is marked off within gates and fences, the plaza, the parking lot, the sidewalks leading from the parking lot to the amusement area, and the area of the boardwalk between the pool and the miniature golf course are nonpublic fora during times that the amusement park is open.[4] These areas provide primary access to the amusement area, and, as such, are integral parts of that area. *Cf. Hotel & Restaurant Employees Union v. New York Dep't of Parks & Recreation*, 311 F.3d 534, 550-51 (2d Cir. 2002) (finding that the Lincoln Center plaza was intended to serve as the architectural centerpiece for the Lincoln Center performing arts complex and was therefore "some special type of enclave," an "extension of the performing arts complex" and "subject to greater restriction."). *See also*

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fireworks display if the pier was very congested at that time and the presence of performers would consequently be dangerous to the public.

[2] The County Executive has acknowledged that the area on the boardwalk near the miniature golf is a public forum by designating it a "Designated Permit Zone" pursuant to Executive Order No. 3-2003

[3] At this time, the Court need not decide whether the beach itself is a public forum, given that Mr. Hobbs never expressed a desire to perform there. *But see Paulsen v. Lehman*, 839 F.Supp. 147, 160 (E.D.N.Y. 1993) (discussing *Naturist Soc., Inc. v. Fillyaw*, 958 F.2d 1515, 1522-23 (11th Cir. 1992)).

[4] However, to the extent that they are not shut off from public access by fences or gates, the plaza, sidewalks and all of the boardwalk are public fora when the amusement area is closed.

Hawkins v. City & County of Denver, 170 F.3d 1281, 1287-88 (10th Cir.), *cert. denied*, 528 U.S. 871, 120 S.Ct. 172, 145 L.Ed.2d 145 (1999); *Chicago Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695, 702-03 (7th Cir. 1998).

Furthermore, the plaza and the boardwalk area adjacent to the bus parking lot become very congested as people enter Playland from the buses, or wait on the boardwalk for departing buses. Mr. Montalto testified that 98,000 people arrived at Playland by bus last year—the vast majority between Memorial Day and Labor Day. In addition, if performers were permitted to give away balloons and engage in performances on the boardwalk in the area directly adjacent to the Beach Shop, their actions could interfere with the commercial activity upon which Playland depends for revenue.

Finally, the Seaside Walk is totally within the gated area of the amusement park, and is closed whenever the amusement area is closed. It gives access directly to the Kite Flyer and Playland Plunge rides; patrons waiting to go on those rides line up on the Seaside Walk to wait. As such, it is part of the nonpublic amusement area.

Damages

Defendants denied Plaintiff's requests for a permit to perform his act at Playland, which were dated August 23, 1999, and May 22, 2000, without any investigation and without offering any alternative venue, solely on the basis of Westchester County regulations that have been held unconstitutional. It was not until nearly two years later that Defendants learned of Mr. Hobbs' misdemeanor convictions for sexual abuse of children. Therefore, Mr. Montalto's denial of Mr. Hobbs' request cannot be justified by those convictions. *See Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 593, 457 N.Y.S.2d 466, 468, 443 N.E.2d 940 (1982) (Judicial review is limited to the "grounds invoked by the agency, and if those grounds are insufficient or improper, the court is powerless to sanction

the determination by substituting what it deems a more appropriate or proper basis."); *In the Matter of Central New York Coach Lines, Inc. v. LaRocca*, 120 A.D.2d 149, 508 N.Y.S.2d 639, 641 (3d Dep't 1986) ("[J]udicial review of an agency decision is limited to the reasons given by the agency in its decision . . . An agency cannot use its answer in a CPLR Article 78 proceeding as a substitute for providing a rational reason in its determination."); *Franco v. Kelly*, 854 F.2d 584, 590 (7th Cir. 1988) ("An act in retaliation for the exercise of a constitutional right is actionable under section 1983 even if the act, when taken for different reasons, would have been proper."). Furthermore, "[i]t is well settled that a person challenging an overly broad statute on First Amendment grounds may do so without being required to demonstrate that his own conduct" 'could not be regulated by a statute drawn with the requisite narrow specificity.' *Dae Woo Kim v. City of New York*, 774 F.Supp. 164, 167 (S.D.N.Y. 1991), *aff'd*, 962 F.2d 3 (2d Cir.), *cert. denied*, 506 U.S. 853, 113 S.Ct. 157, 121 L.Ed.2d 107 (1992).

While it is true that Mr. Hobbs never actually attempted to perform his act at Playland without a permit, and therefore was never arrested or otherwise physically prevented from performing, there is no question that he refrained from doing so solely because of Defendants' warnings that he would not be permitted to perform and would be subject to arrest or physical expulsion in the event that he attempted to perform at Playland without a permit. The same was true in *Irish Lesbian and Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998), and in *United Yellow Cab Drivers v. Safir*, No. 98 Civ. 3670, 2002 U.S. Dist. LEXIS 4866 (S.D.N.Y. March 22, 2002). In the Irish Lesbian case, the Second Circuit held that "[t]he denial of a particular opportunity to express one's views can give rise to a compensable injury." *See also Knoeffler v. Town of Mamakating*, 87 F.Supp.2d 322, 328 (S.D.N.Y.2000). Consequently, Plaintiff is entitled to damages for Defendants' violation of his constitutional rights.

Defendants contend that Plaintiff's damages are purely speculative because he cannot show a history of earnings upon which the Court could predicate an award. However, courts "may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure." *Memphis Comm. School Dist. v. Stachura*, 477 U.S. 299, 311, 106 S.Ct. 2537, 2545, 91 L.Ed.2d 249 (1986). Moreover, Plaintiff's inability to make out a clear damages case is attributable to the fact that, as Plaintiff's counsel candidly stated, Mr. Hobbs "gets rousted" virtually everywhere that he attempts to perform. Furthermore, in order to perform in some of the places where his presence has been tolerated, Mr. Hobbs must pay travel and additional rent expenses that consume virtually all of his earnings, and prevent him from making a profit. To hold that Mr. Hobbs' inability to demonstrate a profitable track record precludes an award of damages would be to penalize him for Defendants' actions. It is because of their enforcement of an illegal ordinance that he was forced to travel from his home in his efforts to find a venue in which he might be permitted to perform. In addition, it would further hold him responsible for the fact that he has repeatedly been denied his First Amendment rights in other places as well.

At the hearing, Plaintiff estimated that he grossed $8,000 to $10,000 in donations during the summer season in Ocean City, Maryland in the mid-1990's, and $800 in two to three weeks in Key West, Florida. Mr. Hobbs also stated that he was able to take in $100 to $200 per day at a Pumpkin Festival in Ohio, and $170 to $180 in several hours at the Easter Parade in New York City. Accepting this testimony, while taking into account its inexact nature and the lack of supporting records, and the lack of clarity as to how often Mr. Hobbs would actually have busked at Playland, if permitted to do so, the Court finds a damages award of $2500 to be reasonable.

Qualified Immunity

Public officials are shielded from liability for damages in their individual capacities "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). In this case, Defendant Montalto is protected from personal liability by the doctrine of qualified immunity. First, Mr. Montalto was simply enforcing what he thought to be a valid County ordinance. *See Knoeffler v. Town of Mamakating*, 87 F.Supp.2d 322, 329 (S.D.N.Y.2000); *Pica v. Sarno*, 907 F.Supp. 795, 804 (D.N.J.1995) (The fact that an official was enforcing a municipal ordinance creates a strong presumption that the official did not believe that he was violating the plaintiff's rights.). Second, it is undisputed that, with some minor exceptions, the County never has allowed First Amendment activity anywhere in Playland. While that fact does not make the position correct, it does support an inference that Mr. Montalto could reasonably have believed that he was not violating Plaintiff's First Amendment rights by acting in accord with that policy.

Furthermore, the lack of clarity as to which areas of Playland were public and which were nonpublic within this mixed use facility, which the County claims it has always viewed as one unified nonpublic forum, and the lack of clarity as to where Mr. Hobbs wished to perform, preclude a finding that a reasonable official in Mr. Montalto's position would have known that he was violating Mr. Hobbs' clearly established constitutional rights by refusing his requests to perform his busking act at Playland Park. Mr. Montalto could reasonably have believed that his actions were constitutional, particularly given that Mr. Hobbs' general request could reasonably have been interpreted as seeking permission to perform within the nonpublic amusement area or adjacent areas that the Court has found to be nonpublic

fora. Consequently, Plaintiff's claims against Mr. Montalto in his individual capacity are dismissed.

Plaintiff's Challenge to § VI of Executive Order 3-2003

As the Court previously stated, it is permissible for the County to enact a narrowly drawn regulation specifically designed to protect children from pedophiles without running afoul of First Amendment guarantees. The second paragraph of § VI of Executive Order No. 3-2003 is such a provision. Such a provision does not impose retroactive punishment in violation of the *Ex Post Facto* clause, provided that it is civil and non-punitive. *Smith v. Doe*, 538U.S. 84, ___, 123 S.Ct. 1140, 1147, 155 L.Ed.2d 164 (2003).

In making that determination, the first place to look is to the County's stated intent, *id.*, which clearly is to prevent "an unreasonable risk to the safety and welfare of children." Executive Order No. 3-2003, § VI, ¶ 2. Like in *Smith* and in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), "nothing on the face of the statute suggests that the legislation sought to create anything other than a civil . . . scheme designed to protect the public from harm." *Smith*, 538 U.S. at ___, 123 S.Ct. at 1147. Nor has Plaintiff suggested that the ordinance has any purpose other than to keep Mr. Hobbs, and anyone else who has been convicted of sexual abuse of children, from performing an act in which they seek to interact with children in a County owned park.

In addition, in evaluating the constitutionality of the Prohibition, the Court must look to its effects in terms of whether, in its necessary operation, the restriction "has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose."[5] *Smith v. Doe*, 538 U.S. at ___, 123 S.Ct. at 1149.

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[5] The two additional factors, whether the regulation comes into play only upon a finding of scienter, and whether the behavior to which it applies is

The Court concludes that with respect to all of these criteria, the provision clearly is civil and regulatory, rather than criminal. Although the Prohibition does impose an affirmative disability or restraint, its provisions are clearly no more harsh than the sanctions of occupational debarment, which were upheld as nonpunitive in *Hudson v. United States*, 522 U.S. 93, 104, 118 S.Ct. 488, 495, 139 L.Ed.2d 450 (1997); *DeVeau v. Braisted*, 363 U.S. 144, 159, 80 S.Ct. 1146, 1154, 4 L.Ed.2d 1109 (1960); and *Hawker v. New York*, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898). As the Court stated in *Smith v. Doe*, 538 U.S. at ___, 123 S.Ct. at 1153, "The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause." While such a provision serves the purpose of deterrence—a traditional aim of a criminal penalty—that alone does not convert the provision into a punishment. *Smith v. Doe*, 538 U.S. at ___, 123 S.Ct. at 1152. ("To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation." (quoting *Hudson v. United States*, 522 U.S. 93, 105, 118 S.Ct. 488, 496, 139 L.Ed.2d 450 (1997)). Furthermore, the provision is not excessive with respect to its stated purpose.

As stated in the December 23, 2002 Order, such a provision also must offer procedural safeguards to Plaintiff and others who are denied the opportunity to perform at Playland pursuant to a county regulation enacted to protect children from pedophiles. Although the Executive Order contains no appeal procedure, Defendants' counsel represented to the Court at oral argument that review of an allegedly arbitrary and capricious decision regarding

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already a crime, are, like in *Smith v. Doe*, 538 U.S. at ___, 123 S.Ct. at 1154, not relevant with respect to the Executive Order at issue here.

enforcement of this Prohibition, made without a reasonable basis in fact, would be subject to review pursuant to the provisions of New York CPLR Article 78. The availability of such a mechanism for appeal is adequate to satisfy this requirement.

Nevertheless, since the Prohibition does implicate First Amendment rights, and is content based,[6] it must withstand strict scrutiny. *Dorman v. Satti*, 862 F.2d 432, 437 (2d Cir. 1988), *cert. denied*, 490 U.S. 1099, 109 S.Ct. 2450, 104 L.Ed.2d 1005 (1989). Accordingly, it must be narrowly tailored to achieve a compelling state interest. Paragraph 2 of § VI of Executive Order No. 3-2003 satisfies that standard.

There can be no question that protecting children from sexual predators constitutes a compelling state interest. *Smith v. Doe*, 538 U.S. at ___, 123 S.Ct. at 1153. *See also New York v. Ferber*, 458 U.S. 747, 757, 102 S.Ct. 3348, 3355, 73 L.Ed.2d 1113 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."). Moreover, the fact that the Prohibition creates a lifetime ban is reasonable in light of the recognition in the cases that "[t]he risk of recidivism posed by sex offenders is 'frightening and high,' " and that " 'contrary to conventional wisdom, most reoffenses do not occur within the first several years after release,' but may occur 'as late as 20 years following release.' " *Smith v. Doe*, 538 U.S. at ___, 123 S.Ct. at 1153. Furthermore, as the Supreme Court stated in *Kansas v. Hendricks*, 521 U.S. 346, 360 & n. 3, 117 S.Ct. 2072, 2081 n. 3, 138 L.Ed.2d 501 (1997), "when a legislature

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[6] The second paragraph of § VI states that no permit will be granted to a person who has been convicted of a sexual offense against a minor if the "performance . . . would entice a child to congregate around that person." "This blanket suppression of an entire type of speech is a content-discriminating act." *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1091 (9th Cir. 1999), *aff'd*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).

'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.'"

The second paragraph of § VI also is narrowly tailored to "target and eliminate no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 2503, 101 L.Ed.2d 420 (1988); *Dae Woo Kim v. City of New York*, 774 F.Supp. at 170. The Prohibition meets this standard because it applies, by its terms, only to individuals who have been convicted of a sexual offense against a minor, and specifically prohibits only "solicitation, performance, demonstration or other similar activity [that] *would entice a child to congregate around* that person." (emphasis added). Thus, consistently with this Order, even a convicted pedophile is free to go to Playland Park, or any other Westchester County park, to distribute leaflets or speak publicly regarding matters of personal or public concern, provided his activities and speech are oriented toward adults and are not of a nature that would be likely to "entice a child to congregate around" him.

Finally, as required by *Turner v. FCC*, 512 U.S. 622, 664, 114 S.Ct. 2445, 2470, 129 L.Ed.2d 497 (1994), the Executive Order can, in fact, be expected to alleviate the harm at which it is aimed "in a direct and material way." The County's "zero tolerance" policy surely will prevent performances of the type it seeks to prohibit. That the provision does not extend further in limiting First Amendment activities does not invalidate it. In fact, that very limitation on its reach supports the Court's finding that the regulation does "not substantially burden more speech than necessary." *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989). It also creates a rational distinction. An individual who sets himself up to perform an act in one spot in the park, using props and equipment, conveys a substantially different impression, and is far more likely to cause a child to become

engaged with him than if that same person simply walked around and approached individual children and attempted to speak with them. Such a stationary set up also is much more likely to attract and engage large numbers of people at one time than is a performer who moves around attempting to speak to individuals. Defendants should not be faulted for enacting an ordinance that defines the conduct that it prohibits as narrowly as possible, and, consequently, allows as much other First Amendment activity as possible to take place.

Plaintiff argues that the Executive Order is unconstitutionally vague and ambiguous because the words, "would entice a child to congregate around," fail to provide a clear definition and/or explicit standards that would give a person of ordinary intelligence an opportunity to know what is prohibited. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972); *Dorman v. Satti*, 862 F.2d 432, 436 (2d Cir. 1988), *cert. denied*, 490 U.S. 1099, 109 S.Ct. 2450, 104 L.Ed.2d 1005 (1989). In addition to failing to provide fair warning as to what is illegal, vague statutes are prone to arbitrary and discriminatory application, and often cause persons to give up lawful and constitutionally guaranteed activities as they exercise an extra degree of caution in their attempts to avoid violating an unclear law. *Grayned*, 408 U.S. at 109, 92 S.Ct. at 2299.

On the other hand, as the Supreme Court stated in *Grayned*, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." 408 U.S. at 110, 92 S.Ct. at 2300. Moreover, it is a general rule of statutory construction that, absent a definition in the statute, courts construe words in their plain and ordinary sense. *Weinberg v. City of Chicago*, 310 F.3d 1029, 1042 (7th Cir. 2002). Applying this rule, the Court finds that the challenged language makes sufficiently clear that it prohibits all child-oriented performances, and thus satisfies the rule stated in *Roth v. United States*, 354 U.S. 476, 491, 77 S.Ct.

1304, 1312, 1 L.Ed.2d 1498 (1957), that "all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."[7] Any possible over breadth or over definition by County officials of the "entice a child" provision can be cured through case-by-case analysis and review. *See New York v. Ferber*, 458 U.S. 747,773-74, 102 S.Ct. 3348, 3363-64 (1982). As the Supreme Court stated recently in *Virginia v. Hicks*, 539 U.S. 113, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003),

> "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law—particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." For there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications before applying the "strong medicine" of overbreadth invalidation.

539 U.S. at ___, 123 S.Ct. at 2197.

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[7] The Webster's Third New International Dictionary (1986), defines "entice" as "allure, attract, tempt, lead astray." These are commonly understood words. Furthermore, although research reveals a number of cases in which defendants have challenged as vague and ambiguous portions of statutes that contained the language, "entice a child" or "entice a minor," it is significant that none of those defendants challenged that particular language in any of the statutes at issue. *See, e.g., Florida v.. Brake*, 796 So.2d 522 (Fla.2001); *New Mexico v. Luckie*, 120 N.M. 274, 901 P.2d 205 (N.M.1995); *Howell v. State*, 172 Ga.App. 805, 324 S.E.2d 754 (Ga.App.1984).

Accordingly, the second paragraph of § VI may constitutionally be applied to deny Plaintiff the right to perform his act at Playland Park.

Plaintiff's Challenge to § III of Executive Order 3-2003

Plaintiff also contends that the Executive Order mandating the creation of "Designated Permit Zones" is over broad on its face. Defendants argue that even if this were so, if Plaintiff can legally be excluded from Playland pursuant to the second paragraph of § VI, he then lacks standing to challenge any other provisions of the Executive Order. Generally it is true that "[a] federal court lacks the power to render advisory opinions and the authority 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Penguin Books USA Inc. v. Walsh*, 929 F.2d 69, 72 (2d Cir. 1991) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971)), and that to establish standing, a plaintiff must " 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." ' *Naturist Society v. Fillyaw*, 958 F.2d 1515, 1521 (11th Cir. 1992) (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). However, in the First Amendment context,

> an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially *invalid.*

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503, 105 S.Ct. 2794, 2802, 86 L.Ed.2d 394 (1985) (citing *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980)). *See also Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987); *New York v. Ferber*, 458 U.S.

747, 768-69, 102 S.Ct. 3348, 3360-61, 73 L.Ed.2d 1113 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973); *Naturist Soc., Inc. v. Fillyaw*, 958 F.2d 1515, 1521 (11th Cir. 1992); *Dae Woo Kim v. City of New York*, 774 F.Supp. 164, 167 (S.D.N.Y. 1991), *aff'd*, 962 F.2d 3 (2d Cir.), *cert. denied*, 506 U.S. 853, 113 S.Ct. 157, 121 L.Ed.2d 107 (1992). Therefore, Plaintiff has standing to challenge the other provisions of Executive Order No. 3-2003.

As the Supreme Court stated in *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 938, 22 L.Ed.2d 162 (1969), "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." Moreover, like the regulation at issue in *Paulsen v. Lehman*, 839 F.Supp. 147 (E.D.N.Y.1993), the Executive Order clearly constitutes a prior restraint that "has two features that permit a facial challenge: (1) an individual must apply for a permit, which may or may not be renewed by the issuer each time the applicant wishes to undertake the activity; and (2) the permit scheme is "directed narrowly and specifically at expression or conduct commonly associated with expression." See Paulsen, 839 F.Supp. at 161 (quoting *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-56, 108 S.Ct. 2138, 2142-43, 100 L.Ed.2d 771 (1988)). *See also Weinberg v. City of Chicago*, 310 F.3d 1029, 1044-46 (7th Cir. 2002).

Although the County no longer takes the position that no First Amendment activity is to be permitted at Playland Park, the Executive Order suffers from many of the same infirmities as the regulations that this Court invalidated in its December 23, 2002 Opinion and Order. Consistently with that Order, the County cannot constitutionally prohibit all First Amendment speech in public forum areas that the County Executive or his delegate have chosen not to name "Designated Permit Zones." It also cannot subject such speech to the prior restraint of a license without clearly

specified standards.[8] Furthermore, the Court previously ruled that the County cannot constitutionally apply Article 23-A of the New York State Correction Law to limit the exercise of one's First Amendment rights, as the County purports to do in the first paragraph of § VI of the Executive Order.[9]

Although Executive Order No. 3-2003 cannot stand consistently with the constitutional requirements stated in this Court's previous Opinion and Order, the second paragraph of § VI can nevertheless be severed and enforced. Severability of a state statute is a question of state law. *Virginia v. Hicks*, 539 U.S. 113, ___, 123 S.Ct. 2191, 2198,

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[8] At this time, the Court need not reach the question of whether "props and equipment" is too vague and ambiguous a term to stand. The second paragraph of § VI, which validly prohibits Plaintiff from performing his act at Playland, appears to be absolute, and makes no mention of props and equipment, despite the apparent limitation of the rest of the Executive Order to individuals using props and equipment. Executive Order No. 3- 2003, § II. Even if the limitation of § II were to apply to the Prohibition contained in the second paragraph of § VI, it would not render that provision unenforceable because it would limit, rather than extend, the reach of the Prohibition.

[9] Clearly, if any person (not just an individual who has been previously convicted of a crime) attempted to exercise his First Amendment rights in such a way as to "create an unreasonable risk to property or safety or welfare of the general public," he could be barred from continuing by other provisions of the law. Furthermore, all of the situations described in § VII of Executive Order No. 3-2003 as bases for revocation of a permit would, without any permit requirement, constitute grounds for preventing or terminating a person from engaging in First Amendment activities that cause the sorts of problems described therein: "if the permitted activity: (i) presents a clear and present danger to the public safety, good order or health; (ii) interferes with ingress or egress onto the County's property ...; (iii) or results in bodily harm to any individual, damage to property, or imminent breach of the peace such that good order cannot otherwise be maintained." In addition, the first section of the first paragraph of § VI, which provides that a permit could be denied if there was a direct relationship between a prior criminal offense and the permit being sought would seem to prohibit a person who had been convicted of an offense from speaking publicly to the effect that the law under which he was convicted was unjust, or that he was wrongly convicted. Plainly, such speech would constitute protected First Amendment activity.

156 L.Ed.2d 148, ___- (2003); *Leavitt v. Jane L.*, 518 U.S. 137, 139, 116 S.Ct. 2068, 2069, 135 L.Ed.2d 443 (1996). Under New York law, "[t]he question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots." *Matter of Westinghouse Elec. Corp. v. Tully*, 63 N.Y.2d 191, 196, 481 N.Y.S.2d 55, 57, 470 N.E.2d 853 (1984) (citing *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60, 129 N.E. 202 (1920) (Cardozo, J.)). *See also In the Matter of Bruce C. Allen v. City of Buffalo*, 143 Misc.2d 1054, 1057-58, 541 N.Y.S.2d 876, 879 (Sup. Ct. Erie County 1989), modified by, 163 A.D.2d 822 (4th Dep't), app. denied, 76 N.Y.2d 712, 563 N.Y.S.2d 768, 565 N.E.2d 517 (1990).

Application of these criteria reveals clearly that the Prohibition of the second paragraph of § VI is severable from the other provisions of the Executive Order. It is unquestionable that the County would wish to protect children from exposure to potential harm by preventing convicted pedophiles from performing acts that would entice children to congregate around them in County parks, regardless of whether it legally can impose the other limitations on general First Amendment activities that are set out in the other sections of Executive Order No. 3-2003.

Conclusion

As stated on the record on April 3, 2003, Plaintiff's demand for punitive damages is denied, Defendants' motion to dismiss the claims against Mr. Montalto as failing to state a claim in his individual capacity is denied, and Defendants' motion for a trial by jury is denied. For the reasons stated in this Opinion, the individual claims against Mr. Montalto are dismissed on the basis of qualified immunity.

Plaintiff is awarded $2,500.00 in damages for the violation of his First Amendment rights as a result of enforcement of Westchester County regulation §§ 712.5, 765.41 and 765.261.

The Court finds that the entire amusement area at Playland Park that is surrounded by gates and fences, the Seaside Walk, the plaza, the parking lot, the sidewalks leading from the parking lot to the amusement area and the area of the boardwalk between the pool and the miniature golf course are nonpublic fora during times when the amusement park is open. The pier, the boardwalk (with the exception of the area between the pool and the miniature golf course), the path from the parking lot to the Edith Read Sanctuary (during times that the gates between the parking lot and the path are open), and the public picnic area on the far side of the path to the Sanctuary constitute public forum areas at Playland Park at all times. In addition, when the amusement area is closed, the entire boardwalk, the sidewalks leading from the parking lot to the amusement area, and the plaza also constitute public fora.

SO ORDERED.

[Reported at 2002 WL 31873462]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Richard P. HOBBS, *Plaintiff*,
v.
COUNTY OF WESTCHESTER, White Plains, New York, and Mr. Montalto, Director of Playland Amusement Park, Rye, New York, *Defendants*.

No. 00Civ.8170(JSM)(LMS)

Dec. 23, 2002

OPINION AND ORDER

MARTIN, J.

Plaintiff Richard Hobbs commenced this action in August 2000, to challenge, on First Amendment grounds, Westchester County's refusal to permit him to perform a busking act[1] at Playland Park during the 1999 and 2000 summer seasons.[2] Mr. Hobbs sought to perform a clown act, give away balloon sculptures, engage in humorous social commentary, and accept donations from passersby "along a public way or at any place where the public was accustomed to strolling at Playland." (Complaint at 3). He sought declaratory and injunctive relief.[3]

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[1] According to Dictionary.com, "to busk" means to play music or perform entertainment in a public place, usually while soliciting money.

[2] Plaintiff also alleged that the County's refusal to permit him to perform at Playland violated the antitrust laws—a claim that neither he nor Defendants have addressed in their subsequent submissions.

[3] Although Mr. Hobbs discussed the need to accept money from his audience in order to survive (Complaint at 16, 17-18, 19-20, 23, 28) in his *pro se* Complaint, he made no demand for damages. Nevertheless, Defendants have explored damages-related issues in discovery, and both sides have briefed damages issues in connection with their respective motions for summary judgment. The Court will address the question of

Facts

Playland is a 279 acre recreational complex that has been owned and operated by the County of Westchester since 1928 (with the exception of a four year period in the 1980's, during which it was managed by a private company.) Playland is best known for its amusement park, which includes 45 rides, carnival type arcade games and concession stands that sell food and souvenirs. It is the only government owned and operated amusement park in the United States. Entrance to the amusement park area is free, but there is a charge for tickets for the rides and to play the arcade games. The concessionaires who run the game, souvenir and food booths pay fees to the County.

In addition to the amusement park, Playland's facilities include picnic shelters (which are designated for private group use), public picnic areas, a miniature golf course, a swimming pool, a 1200 foot beach and boardwalk, a lake for boating, an ice rink, a Boardwalk Museum, and a 320 foot pier. Free entertainment is provided within the amusement park, including, at various times, musical revues, strolling bands, and costumed characters. Big Band concerts and dancing are held on the boardwalk. Fireworks displays take place on a regular basis during the summer months.

By letter dated May 22, 2000, Mr. Hobbs wrote to Mr. Joseph Montalto, Director of Playland, expressing his desire to engage in busking at Playland. He stated, "I hereby apply for whatever 'permit' you would require me to obtain if any in order to; sit on a bench (or my own chair) along a popularly traveled promenade at Playland, and perform my act and create balloon sculptures in the free exercise of my free speech . . . ."[4] This request was denied by Mr. Montalto,

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damages with the parties at the conference at which it will determine how to proceed with respect to the issues that remain in this case.

[4] The record also contains an earlier email dated August 23, 1999, addressed to Westchester County Executive Andrew Spano, requesting

who stated that solicitation of "alms, subscriptions or contributions for any purpose" was prohibited in any Westchester County park, citing "Westchester County Law § 712.51 (General Ordinance Number 2)". Mr. Montalto stated that Playland was not a public forum, that the County had "retained the services of strolling performers and puppeteers," and that "[n]o other such performances are authorized at Playland." He also stated that, "General Ordinance Number 2 will be vigorously enforced in order to ensure the public's continued enjoyment of this amusement park . . . and to ensure that the operations of the County of Westchester and its vendors are not disrupted." Finally, he concluded, "If you wish to challenge the constitutionality of the County's assertion of its proprietary rights, I would urge you to do so by resort to judicial process rather than unlawful and disorderly conduct."

Mr. Hobbs again sought such permission in 2001, and was again refused on the same grounds. In addition, by that time the County had learned, during discovery in connection with this litigation, that Mr. Hobbs had been convicted of sexual abuse of minors in 1978 and 1982. Accordingly, Mr. Montalto stated that he had concluded that in light of those circumstances it would constitute an unreasonable safety and security risk to allow Mr. Hobbs to have contact with children at Playland.

Subsequently, in April 2002, Westchester County adopted a "Playland Usage Permit—Permit Request" form, which requires basic information about the event or performance for which permission is sought, and disclosure regarding

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any permit necessary to entertain at Playland, or, alternatively, "a letter informing me that I may enjoy my rights and should not be interfered with by any 'police officers' or other county officials." In his Complaint, the Plaintiff also states that Mr. Montalto stated to him, during a telephone conversation, that Plaintiff would not be permitted to perform at Playland, even if he did not accept money from the public. (Complaint at 4).

whether the applicant has ever been convicted of a crime. The form also contains a notice regarding the provisions of New York Correction Law § 753, sets out insurance requirements, and states that "solicitation of any member of the Public is strictly forbidden at Playland."

Plaintiff and Defendants have cross-moved for partial summary judgment in this action.

Discussion

As the analysis that follows will demonstrate, in large measure the dialogue between Plaintiff and the County of Westchester which preceded this lawsuit suffered from a lack of appreciation by both parties of the fact that Playland Park is more than the amusement park, a lack of precision in identifying where in the Park Plaintiff wished to perform, and a failure to recognize that Plaintiff arguably did not need a permit to exercise his First Amendment rights. While his Complaint suggests that the only place in the Park in which Plaintiff could profitably perform was the amusement area,[5] his correspondence was not inconsistent with a desire to perform anywhere within the Playland Park complex. To the extent that Plaintiff sought a permit to perform in a public forum area of Playland Park, removed from the amusement area, he had a First Amendment right to do so, and did not need a permit. However, Mr. Montalto, the Director of Playland, would not issue one because of the County's unconstitutional ordinance prohibiting solicitation in any of its parks.

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[5] "Mr. Montalto, the director of the amusement park called Playland, refused to give Plaintiff a permit to perform . . . on the grounds of Playland Amusement Park . . . which is a Westchester County-owned and County-operated Amusement Park." (Complaint at 1); "[A busker's] particular form of this art requires a very specific type of audience . . . Playland itself and the atmosphere that exists there are vitally needed for this art form to have any hope of surviving in our culture." (Complaint at 8); "The venue must be a place where the public is gathering to be entertained and amused." (Complaint at 9).

In the motions before the Court the parties continue to take absolutist positions. Plaintiff argues that all of Playland Park is a traditional public forum in which he has an absolute right to perform under the First Amendment. Defendants argue that all of Playland is a nonpublic forum, which the County operates in its proprietary capacity, as a business, with the aim of making a profit, and therefore it can bar Plaintiff from performing anywhere in the Park complex. However, neither of these absolutist positions is correct. While the amusement area of Playland Park is not a public forum and the County can prohibit Plaintiff from performing there, other parts of the park, which are removed from the amusement area, are no different from other public parks, which have consistently been held to be public fora in which the exercise of First Amendment rights may not be prohibited.

I. *First Amendment Forum Analysis*

The activities proposed by Mr. Hobbs are protected by the First Amendment. *International Society of Krishna Consciousness v. Lee*, 505 U.S. 672, 112 S.Ct. 2701, 2705, 120 L.Ed.2d 541 (1992); United States v. Kokinda, 497 U.S. 720, 725, 110 S.Ct. 3115, 3118, 111 L.Ed.2d 571 (1990) ("Solicitation is a recognized form of speech protected by the First Amendment."); *Loper v. New York City Police Dep't*, 999 F.2d 699, 704-05 (2d Cir. 1993) ("It cannot be gainsaid that begging implicates expressive conduct or communicative activity."). *See also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 115 S.Ct. 2338, 2345, 132 L.Ed.2d 487 (1995) ("[T]he Constitution looks beyond written or spoken words as mediums of expression."); *Naturist Society, Inc. v. Fillyaw*, 958 F.2d 1515, 1523 (11th Cir. 1992) (Restrictions must meet the same standard "whether the expression is 'oral or written or symbolized by conduct." ') (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984)). However, the fact that property is owned by the government does not

necessarily mean that it is open to the public for all First Amendment purposes. Kokinda, 497 U.S. at 726, 110 S.Ct. at 3119; *United States Postal Service v. Council of Greenburgh Civic Assocs.*, 453 U.S. 114, 129, 101 S.Ct. 2676, 2684, 69 L.Ed.2d 517 (1981).

The determination of whether the government's interest in limiting the use of its property to its intended purpose outweighs the interest of persons who seek to use the property for the exercise of their First Amendment rights is made pursuant to a "forum analysis", which recognizes three types of public property. *Kokinda*, 497 U.S. at 726, 110 S.Ct. at 3119; *USPS v. Council of Greenburgh Civic Assocs.*, 453 U.S. 114, 129, 101 S.Ct. 2676, 2685, 69 L.Ed.2d 517 (1981). The extent to which the government may control access depends on the nature of the forum. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 105 S.Ct. 3439, 3447-48, 87 L.Ed.2d 567 (1985); *Perry Educ. Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983) ("The existence of a right of access to public property and the standard by which limitations upon such a right might be evaluated differ depending on the character of the property at issue."); *Calash v. City of Bridgeport*, 788 F.2d 80, 82 (2d Cir. 1986) ("The right of access to government property and the standards by which limitations on access must be evaluated vary according to the classification.").

A public forum is one that has traditionally been available for public expression. Streets and parks are such "quintessential traditional" public fora. *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1286 (10th Cir.), *cert. denied*, 528 U.S. 871, 120 S.Ct. 172, 145 L.Ed.2d 145 (1999). As the Supreme Court stated in *Hague v. CIO*, 307 U.S. 496, 516, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939),

> "[S]treets and parks . . . have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating

> thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens."

See also First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1128 (10th Cir. 2002) ("Expressive activities have historically been compatible with, if not virtually inherent in, spaces dedicated to general pedestrian passage.").

Content-based restrictions on First Amendment expression in a public forum are subjected to strict scrutiny, must serve a compelling state interest, and must be narrowly tailored to achieve that interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989); Perry, 460 U.S. at 45, 103 S.Ct. at 955; *Hotel Employees and Restaurant Employees Union v. City of New York Dep't of Parks & Recreation*, No. 01-7602, 2002 U.S.App. LEXIS 23707, *19 (2d Cir. Nov. 18, 2002). Time, place and manner restrictions that are content-neutral must be narrowly drawn to achieve a significant state interest and leave open ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. at 791, 109 S.Ct. at 2753; *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 800, 105 S.Ct. 3439, 3447-48, 87 L.Ed.2d 567 (1985); *Hotel Employees*, 2002 U.S.App. LEXIS 23707, at *20.

The second type of property is a designated public forum—a site that is not a traditional public forum, but "which the government has designated as a place or channel of communication for use by the public at large . . . or for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3449; *Calash v. City of Bridgeport*, 788 F.2d 80, 82 (2d Cir. 1986). The creation of such a designated, or limited, public forum must be intentional. The government does not create such a forum by permitting limited discourse. *Cornelius*, 473 U.S. at 802,

105 S.Ct. at 3449 ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."). *See also Perry*, 460 U.S. at 47, 103 S.Ct. at 956; *Young v. New York City Transit Authority*, 903 F.2d 146, 161 (2d Cir.), *cert. denied*, 498 U.S. 984, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990); *Hawkins v. Denver*, 170 F.3d 1281, 1288 (10th Cir.), *cert. denied*, 528 U.S. 871, 120 S.Ct. 172, 145 L.Ed.2d 145 (1999).

As long as a designated public forum remains such, restrictions on the exercise of First Amendment rights are governed by the same standards that apply to a traditional public forum. On the other hand, if a limited public forum is created for the use of certain speakers or for the discussion of certain subjects, the First Amendment protections applied to traditional public fora apply only to entities of a character similar to those that the government has chosen to admit to the forum. *Hotel Employees*, 2002 U.S.App. LEXIS 23707, at *45; *Calash*, 788 F.2d at 82.[6]

The third type of government owned property is a nonpublic forum—one that is not "by tradition or designation a forum for public communication." *Perry*, 460 U.S. 37, 46, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983); *Calash*, 788 F.2d at 82. If a site constitutes a nonpublic forum, the government may "reserve the forum for its intended purposes" through reasonable viewpoint neutral restrictions on expression. *Cornelius*, 473 U.S. at 811, 105 S.Ct. at 3453 ("The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a non-public forum and hinder its effectiveness for its intended purpose."); *Perry*, 460 U.S. at 46, 103 S.Ct. at 955; *Loper v. New York City Police Dep't*, 999 F.2d 699, 703 (2d Cir. 1993). Such

[6] Exclusions of other (not included) categories of speech from a limited public forum are treated in the same way as exclusions from a nonpublic forum. They need only be reasonable and viewpoint neutral. *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 128-29n.2 (2d Cir.), *cert. denied*, 525 U.S. 824, 119 S.Ct. 68, 142 L.Ed.2d 53 (1998).

restrictions need only be reasonable—they need not be the most reasonable or the only reasonable limitations possible. *Cornelius*, 473 U.S. at 808, 105 S.Ct. at 3452; *Hawkins v. Denver*, 170 F.3d at 1290. There is no requirement that the restriction be narrowly tailored or that the government's interest be compelling. *Cornelius*, 473 U.S. at 809, 105 S.Ct. at 3452. It also is irrelevant that the desired forum would offer the most efficient venue for delivering the speaker's message. *Id.*, 473 U .S. at 809, 105 S.Ct. at 3452; *Hawkins*, 170 F.3d at 1292.

The Amusement Area

The amusement area within Playland Park has all of the earmarks of a nonpublic forum. That area is run by the County with the intent of making a profit, whether or not it actually has succeeded in generating a profit in any given year.[7] Since it is the only government owned amusement park in the United States, it cannot be argued that amusement parks are traditional public fora. Nor has the County ever made the amusement area at Playland open for public discourse. To the contrary, the County has consistently attempted to maintain control over the environment at Playland to ensure that it remains "wholesome" and "family oriented." Accordingly, it has refused to permit performances by persons other than those brought in by American Entertainment Productions (with whom the County has an exclusive contract to provide all of the entertainment presented at Playland). It also has consistently refused to allow any other free speech activities, except for limited leafletting (with a permit) by candidates in local elections.[8] Moreover, the County has consistently prohibited soliciting at Playland (or any other County-owned park) by

[7] The record shows that the amusement area did, in fact, generate a profit of $47,000 in 2000.

[8] The fact that limited leafletting by political candidates has been allowed from time to time does not convert the area into a public forum. *Kokinda*, 497 U.S. at 730, 110 S.Ct. at 3121 (Selective access does not transform government property into a public forum.).

any person or organization. That refusal is based on § 765.41 of the Westchester County Parks Regulations regarding Parks, Parkways and Recreational Facilities. That section provides that "[n]o person shall solicit alms, subscriptions or contributions for any purpose." This policy of prohibiting all solicitation at Playland also is explicit in the Playland Usage Permit adopted by the County in April 2002.[9] In addition, the County has been consistent in its refusal to permit any activities within the amusement area (like giving away balloons, as Plaintiff proposes) that would compete with the business of the concessionaires who pay fees to the County for their booths.

Finally, the amusement area is largely self-contained. It is surrounded by fences and gates, which, in most areas, create clear demarcations between the amusement area and the other areas within Playland Park, and it does not serve as a natural thoroughfare for persons walking from place to place either within Playland or between the surrounding parks, facilities, and nearby residential areas.

As a nonpublic forum, the amusement area is governed by the rule that "[t]he state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Perry*, 460 U.S. at 46, 103 S.Ct. at 955. Consequently, "the challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *International Society of Krishna Consciousness v. Lee*, 505 U.S. at 679, 112 S.Ct. at 2705.

The County states that its policies banning unauthorized First Amendment activities within the amusement area are necessary to attract its paying customers. It argues that performances by entertainers who have not been approved by American Entertainment could negatively impact the

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[9] That permit states, "Please note that solicitation of any member of the Public is strictly forbidden at Playland."

atmosphere sought within the amusement park, and would cause congestion and obstructions on the pathways within that area. It also argues that any activities (like giving balloon sculptures to children, as Plaintiff proposes) that compete with its concessionaires would undermine its efforts to make the amusement area profitable.

Taken in the context of the amusement area, which is a nonpublic forum, these are reasonable concerns that do not reflect hostility to a particular point of view. The County has a right to control the environment within the amusement area in a way that, in its best business judgment, will maximize its ability to generate a profit. Clearly, the congestion that would result if substantial numbers of people stopped to watch or participate in a clown (or other) act along the paths and mall area within the amusement park would make the area less attractive to many families. In addition, the County has an obvious interest in protecting its licensed, fee-paying vendors from direct competition within that area, since the fees paid by the concessionaires are necessary to the commercial success of the amusement park. Finally, the ban on solicitation within the amusement area is reasonable since "solicitation is unquestionably a particular form of speech that is disruptive of business." *Kokinda*, 497 U.S. at 733, 110 S.Ct. at 3123; *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683, 112 S.Ct. 2701, 2708, 120 L.Ed.2d 541 (1992).

In *Chicago Acorn, SEIU v. Metropolitan Pier and Exposition Authority*, 150 F.3d 695, 703 (7th Cir. 1998), in which the Seventh Circuit considered similar issues arising from the operation of an entertainment center on the Navy Pier in Chicago, the court stated,

> [b]ecause the MPEA owns the buildings on Navy Pier and depends for the upkeep of the pier on the commercial revenues that those buildings generate, it has a legitimate and substantial interest in preventing activities that could kill those revenues.

Finding that "[s]electivity and restriction are of the essence of the commercial strategy that informs the MPEA's management of the [nonpublic portions of] the pier," the Court held that Plaintiffs in that case did not have the right to rent a nonpublic entertainment center if the MPEA believed that the spillover of such a use of the center would negatively affect its revenues from the shops and other concessions on the pier. 150 F.3d at 700. Thus, the Court found that the government's restrictions on First Amendment speech were reasonable, especially given that an alternative venue for reaching the Plaintiffs' intended audience was close at hand.[10]

Similarly, because the County's restrictions on First Amendment expression within the amusement area are reasonable, are reasonably related to their stated objectives, and are not related to the viewpoint of the proposed speaker, those regulations, as applied to the amusement area, pass constitutional muster.

The Picnic Shelters, Ice Rink, Boardwalk Museum, Pool, and Miniature Golf Course

Pursuant to the same analysis, the Court finds that the picnic shelters, which are reserved for private use for parties and corporate events, the ice rink, Boardwalk Museum, pool, and miniature golf course are nonpublic fora. All are

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[10] The government does not, however, have the total freedom to control its property that is enjoyed by a private owner. Accordingly, the Seventh Circuit stated in *Acorn*, that "nowhere is it written that government, when it embarks on essentially commercial ventures, is entitled to the same freedom of action as private venturers. It is not as if the ownership of shopping malls and convention centers were at the core of the American concept of government." 150 F.3d at 701. Thus, although the Seventh Circuit held in Acorn that the plaintiffs were not entitled to rent the entertainment center on the pier, it also held that they would be permitted to leaflet on the sidewalks and in other open areas within the pier, as long as they were not in areas where pedestrian traffic would be obstructed. They also would not be permitted to picket, stage marches, hold demonstrations, wave posters, use bull horns or public address systems, speak from a soap box, or solicit money or signatures. *Acorn*, 150 F.3d at 701.

contained areas, which are run with the intent of making a profit. None are the types of venue that are traditionally open for public speech and debate. Consequently, the County's restrictions on First Amendment expression are reasonable as applied to those areas.

The Boardwalk, Pier, Paths, Park and Picnic Areas

In addition to the areas discussed above, Playland Park includes park and picnic areas, paths, and a boardwalk, all of which share all the earmarks of traditional public fora.[11] One path leads from the Edith Read Sanctuary to the parking lot and amusement area, and one leads from Rye Town Park to the end of the pier. These paths and the boardwalk apparently are accessible to foot traffic when the amusement facilities are closed, do not charge admission, and apparently are not operated with the aim of generating a profit. However, in its regulations, and its papers submitted on this motion, the County has not distinguished between the amusement area, ice rink, miniature golf course, picnic shelters, boardwalk museum, beach, and pool on the one hand, and the park, pier, boardwalk and paths on the other.

Since sidewalks, streets and parks are "quintessential" public fora, the government bears the burden of establishing why some or all of these paths, park areas and the boardwalk should be considered different, and should not be open for First Amendment expression by the public. *Perry*, 460 U.S. at 46, 103 S.Ct. at 955; *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 576 (9th Cir.), *cert. denied*, 510 U.S. 915, 114 S.Ct. 306, 126 L.Ed.2d 253 (1993). It also must be noted that such areas do not lose their historically recognized

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[11] Several cases have acknowledged that beaches are not places where leafletting or other such First Amendment activities must be allowed, although holding, in each case, that such activities must be permitted on walkways and other areas that provide access to those beaches. *See The Naturist Society v. Fillyaw*, 958 F.2d 1515 (11th Cir. 1992); *Paulsen v. New York State Office of Parks, Recreation and Historic Preservation*, 839 F.Supp. 147 (E.D.N.Y. 1993). In any event, Plaintiff has not indicated any desire to perform on the beach at Playland.

character as public fora simply because they abut government property that has been dedicated to nonpublic use. *United States v. Grace*, 461 U.S. 171, 180, 103 S.Ct. 1702, 1708, 75 L.Ed.2d 736 (1983). Nor is the fact that Westchester County has been consistent in refusing to permit First Amendment activities at Playland dispositive on this issue. As the Court stated in *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1130 (10th Cir. 2002),

> Where courts have considered the traditional use of publicly accessible property for speech, they have refused to attribute legal significance to an historical absence of speech activities where that non-speech history was created by the very restrictions at issue in the case.

See also Lederman v. United States, 291 F.3d 36, 43 (D.C. Cir. 2002) ("restrictions cannot bootstrap themselves into validity by their mere existence, even if prolonged.").

To the extent that the park areas, paths, boardwalk and pier within Playland Park are public fora, any restrictions on First Amendment expression are subject to strict scrutiny, and must be (1) content neutral, (2) narrowly tailored to serve a significant government interest, and (3) leave ample alternatives for communication. *Ward v. Rock Against Racism*, 491 U.S. at 791, 109 S.Ct. at 2753 (1989). On the other hand, if restrictions are content based, they must be necessary to serve a compelling state interest. *Perry*, 460 U.S. at 45, 103 S.Ct. at 955; *International Society for Krishna Consciousness v. Lee*, 505 U.S. at 678, 112 S.Ct. at 2705.

The County's total ban on solicitation anywhere at Playland is a content based restriction on speech. *Loper v. New York City Police Dep't*, 999 F.2d 699, 704-05 (2d Cir. 1993) ("It is not content neutral because it prohibits all speech related to begging."). However, the County has not articulated a compelling state interest that makes such a restriction necessary. As the Second Circuit stated in *Loper*,

> [I]t does not seem to us that any compelling state interest is served by excluding those who beg in a peaceful manner from communicating with their fellow citizens. Even if the state were considered to have a compelling interest in preventing the evils sometimes associated with begging, a statute that totally prohibits begging in all public places cannot be considered "narrowly tailored" to achieve that end. Because of the total prohibition, it is questionable whether the statute can be said to "regulate" the time, place and manner related to begging; it certainly is not narrowly tailored to serve any significant governmental interest, . . . it does not leave open alternative channels for communication.

Id., 999 F.2d at 705.

Accordingly, Westchester County Law § 712.5 banning solicitation in any County park and regulation § 765.41, banning any and all solicitation anywhere in Playland Park, and the April 2002 permit application procedure, which states that "solicitation of any member of the Public is strictly forbidden at Playland," cannot withstand scrutiny and are unconstitutional as applied to the public forum areas within Playland.

In addition to the total ban on solicitation at Playland, Westchester County regulation § 765.261, upon which the County apparently relied in requiring Plaintiff to obtain a permit to perform his act at Playland (and in creating its April 2002 permit application), is ambiguous as to whether it actually does apply to Plaintiff's request to perform. On the one hand, that section states that,

> No person in any park or park street shall . . . hold or sponsor any kind of public entertainment . . . without a permit from the department.

* * *

> No person shall . . . exhibit or distribute any sign, placard, declaration or appeal of any description in any park or park street, except by permit.

On the other hand, that section may well not apply to Plaintiff because it also states that "[i]mpromptu or dramatic readings, poetry readings, or performances which do not become noisy or disruptive are allowed." Although Plaintiff's act does not involve amplification, it is not disputed that the County has taken the position that Plaintiff was required to obtain a permit to perform his act anywhere within Playland, and that it would not, and will not issue such a permit to him. It also is undisputed that Mr. Montalto made clear to Plaintiff that if he attempted to perform at Playland, he would be forced to leave, and/or arrested. Prior to learning of Plaintiff's convictions, that refusal was predicated on the ban on solicitation, and perhaps on § 765.261, since, when Plaintiff asked whether he could perform if he did not solicit donations, Mr. Montalto stated that Plaintiff would not be permitted to perform under any circumstances.[12]

Assuming that the permit requirement did, in fact, apply to Plaintiff's performance, the County did not comply with its own regulation (§ 765.261), which also states:

> Upon application the commissioner shall issue such permit unless: (1) the use for which the permit is sought would substantially interfere with park use and enjoyment

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[12] Perhaps this refusal was based on the belief that Plaintiff's performance would run afoul of yet another sentence within § 765.261, which states, "However, no such reading or performances may interfere with the ordinary enjoyment of the park facilities by others." However, Mr. Montalto could not properly make such a judgment without first seeing whether Mr. Hobbs' act did, in fact, disturb the public's enjoyment of the public forum areas of the park. Absent such an assessment, "we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application." *Cantwell v. Connecticut*, 310 U.S. 296, 309, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940).

by the public; (2) the location sought is not suitable because of special landscaping and planting; (3) the location is not suitable because it is a specialized area, including but not limited to, a zoo, swimming pool, or skating rink; (4) the date and time requested has previously been allotted by permit; (5) it would impair the public safety, health or welfare. Whenever a permit is denied, alternative suitable locations and dates shall be offered to the applicant.

Even if these constitute reasonable time, place and manner restrictions, pursuant to which the County could properly refuse to grant Plaintiff a permit to perform at certain locations within Playland, there has been no showing that Mr. Montalto actually considered the factors enumerated, or that he offered Plaintiff any alternative location, either within Playland Park or nearby, or even in a park elsewhere in Westchester County.[13]

Moreover, this provision, as applied, runs afoul of the First Amendment as well. It leaves the decision whether to grant or deny a permit to exercise First Amendment rights at any location within Playland Park in the discretion of the commissioner, who must determine, without clear standards, whether the activity at issue would "substantially interfere with park use and enjoyment by the public." Such a grant of discretion is rarely upheld.

In *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 938-39, 22 L.Ed.2d 162 (1969), the Supreme Court invalidated an ordinance that permitted the city commission to prohibit any parade or demonstration on the city streets. In so doing, it stated that "a law subjecting the

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[13] Thus, Mr. Montalto's action was similar to that found unconstitutional in *United Yellow Cab Drivers Assoc., Inc. v. Safir*, No. 98 Civ. 3670, 2002 Dist. LEXIS 4866, *23 (S.D.N.Y. March 22, 2002). There, the Court stated that "Chief Anemone's response was the antithesis of a time, place or manner restriction; he simply ordered Deputy Chief Fox to inform Plaintiffs that no demonstration would be allowed under any circumstances."

exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554, 95 S.Ct. 1239, 1244, 43 L.Ed.2d 448 (1975) (application process constituted an impermissible prior restraint because it depended on the board's affirmative action, approval was not a matter of routine, and it involved the "appraisal of facts, the exercise of judgment, and the formation of an opinion" by the board); *Cantwell v. Connecticut*, 310 U.S. 296, 305-7, 60 S.Ct. 900, 904-5, 84 L.Ed. 1213 (1940); *Paulsen v. Lehman*, 839 F.Supp. 147, 169 (E.D.N.Y. 1993) ("If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion,' by the licensing authority, 'the danger of censorship and abridgement of our precious First Amendment freedoms is too great' to be permitted." (internal citations omitted)).

In *Watchtower Bible and Tract Society of New York, Inc. v. Stratton*, 536 U.S. 150, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002), the Supreme Court invalidated an ordinance that required anyone who wished to go door to door canvassing to obtain a permit, even though there was no charge for the permit, and it was routinely issued. In that case, the Court stated,

> The mere fact that the ordinance covers so much speech raises constitutional concerns. It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition."

Id., 122 S.Ct. at 2089.

Here, the provision that allows the commissioner to unilaterally refuse to issue a permit to perform in any public forum area within Playland on the basis of that individual's judgment that the planned performance would "substantially interfere with park use and enjoyment by the public," without articulating any objective basis for that determination is far more invasive, and, as such, constitutes an impermissible prior restraint.[14]

New York Correction Law Article 23-A

Defendants also contend that, regardless of the Court's disposition of the First Amendment issues raised by Plaintiff, the denial of a permit to Mr. Hobbs, who was convicted of sexual abuse of minors in 1978 and 1982, was, and continues to be, justified under New York Correction Law §§ 752 and 753, and under the Playland Usage Permit Request form, which was adopted by the County in April 2002, and incorporates the standards set out in those sections of the Correction Law. They argue that granting Mr. Hobbs a permit would "involve an unreasonable risk to property or the safety or welfare of specific individuals or the general public."

Article 23-A was enacted in order to prohibit unfair discrimination in the employment or licensure of persons

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[14] This finding does not in any way undermine the long established principle that "[c]onduct remains subject to regulation for the protection of society", and that the state may "safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." *Cantwell v. Connecticut*, 310 U.S. at 304, 60 S.Ct. at 903. Accordingly, nothing in this Opinion should be interpreted as implying that a ban on certain types of First Amendment expression, or a properly limited permit requirement, may not constitute reasonable time, place and manner restrictions if based upon real concerns about traffic safety, congestion and obstruction of pathways at certain times of day or during certain events (for example, when there are fireworks displays or band concerts on the boardwalk), or any other such issues. The County is free to enact such properly drawn regulations.

previously convicted of criminal offenses. N.Y. Correction Law § 753(1)(a).[15] Accordingly, § 752 provides that an application for employment or a license shall not be denied because of a previous conviction, unless either (1) there is a direct relationship between the criminal offense and the specific license or employment sought; or (2) granting the employment or license would "involve an unreasonable risk to property or the safety or welfare of specific individuals or the general public." Section 753 then sets out factors that a licensing agency must consider in determining whether a person falls within one of the exceptions to the general proscription against discriminating against persons who have been previously convicted of a criminal offense.[16]

The Defendants argue that Article 23-A applies to Mr. Hobbs' application for a permit to busk at Playland

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[15] "Employment" is defined in the statute as "any occupation, vocation or employment, or any form of vocational or educational training." N.Y. Correction Law § 750(5). "License" is defined as "any certificate, license, permit or grant of permission required by the laws of this state, its political subdivisions or instrumentalities as a condition for the lawful practice of any occupation, employment, trade, vocation, business, or profession." N.Y. Correction Law § 750(4).

[16] These factors include: the public policy of the state to encourage employment and licensure of persons previously convicted of criminal offenses; the specific duties and responsibilities necessarily related to the license sought; the bearing, if any, the offenses would have on his fitness or ability to perform such duties and responsibilities; the time which has elapsed since the occurrence of the criminal offense; the age of the person at the time of the offense; the seriousness of the offense; any information produced by the person in regard to his rehabilitation and good conduct; and the legitimate interest of the agency in protecting property, as well as the safety and welfare of specific individuals or the general public. N.Y. Correction Law § 753. Even if §§ 752 and 753 applied to Mr. Hobbs' application, the record contains no indication that Mr. Montalto considered the necessary factors when he denied Plaintiff's application. In fact, Mr. Montalto testified that he knew practically nothing about Mr. Hobbs or his convictions when he denied him a permit to busk anywhere in Playland Park. This does not comply with the requirements of the statute. *See Bonacorsa v. Van Lindt*, 71 N.Y.2d 605, 609, 528 N.Y.S.2d 519, 520, 523, 523 N.E.2d 806 (1988); *Marra v. City of White Plains*, 96 A.D.2d 17, 22, 467 N.Y.S.2d 865, 869 (2d Dep't 1983).

because he states that busking is his profession or occupation, and the requested permit falls within the terms of § 750(4) in that it is a "permit or grant of permission required by the laws of this state, its political subdivisions or instrumentalities as a condition for the lawful practice of any occupation, employment . . . or profession." The Defendants also argue that even if § 753 does not apply directly to Plaintiff's request for a permit, the County has incorporated its standards into its permit request form.

"[A]lthough convicted felons do not enjoy the full panoply of constitutional rights, they are not totally deprived of these, including First and Sixth Amendment rights." *Goodwin v. Oswald*, 462 F.2d 1237, 1251 (2d Cir. 1972) (Oakes, C. J., concurring). *See also Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969); *Sobell v. Reed*, 327 F.Supp. 1294 (S.D.N.Y. 1971); *Seale v. Manson*, 326 F.Supp. 1375 (D.Conn. 1971); *Payne v. Whitmore*, 325 F.Supp. 1191 (N.D. Cal. 1971); *Fortune Society v. McGinnis*, 319 F.Supp. 901 (S.D.N.Y. 1970). Since the requirement that Plaintiff obtain a permit in order to perform at Playland is a restriction on the exercise of otherwise permissible First Amendment expression, it will pass constitutional muster as a permissible time, place and manner restriction only if it is narrowly drawn, objective, and content-neutral. *Shuttlesworth v. Birmingham*, 394 U.S. at 150-51, 89 S.Ct. at 938-39. Moreover, if the application of the statute itself invades the Plaintiff's constitutional rights, the situation is no better when the relevant provisions are imported into a permit request procedure by regulation.

Defendants argue that Plaintiff should not be permitted to busk anywhere in Playland Park because children who see him perform may believe that they can trust him (a message with which the Defendants disagree), and he might, as a

result, have the opportunity to sexually abuse them later.[17] Although this may be true, the regulation at issue is not narrowly drawn to protect against a particular danger posed by a specific class of persons convicted of specific crimes. It is not limited, for example, to the regulation of specific conduct by convicted pedophiles, but rather gives the commissioner broad discretion to determine what classes of previously convicted persons should be generally prohibited from engaging in constitutionally protected speech. Moreover, the evaluation required by the standards set forth in these sections clearly involves an appraisal of subjective, content-based factors.[18] As noted above, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. Birmingham*, 394 U.S. at 150-51, 89 S.Ct. at 938-39. Therefore, the County cannot prevent the Plaintiff from exercising his First Amendment rights based on either Article 23-A or the equivalent provisions of the permit request form.

This is not to say, however, that a narrowly drawn regulation specifically designed to protect children from

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[17] Ordinarily, "[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.' " *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 1403, 152 L.Ed.2d 403 (2002) (citing *Hess v. Indiana*, 414 U.S. 105, 108, 94 S.Ct. 326, 328, 38 L.Ed.2d 303 (1973)). *See also American Library Ass'n, Inc. v. United States*, 201 F.Supp.2d 401, 474-75 (E.D. Pa. 2002) ("First Amendment jurisprudence makes clear that speech may not be restricted on the ground that restricting speech will reduce crime or other undesirable behavior that the speech is thought to cause.. . . The mere tendency of speech to encourage unlawful acts is insufficient reason for banning it.") (internal citations omitted); *Cantwell v. Connecticut*, 310 U.S. at 309, 60 S.Ct. at 905-6 ("[A] State may not unduly suppress free communication of views . . . under the guise of conserving desirable conditions.").

[18] This is necessarily so since decisions regarding employment or licensure involve, by definition, an exercise of discretion by the employer or licensing authority. Thus, they are basically incompatible with the standards that apply to restrictions on First Amendment expression.

pedophiles could not pass constitutional muster if it included sufficient procedural safeguards.[19] The Courts have recognized that there are situations in which the First Amendment rights of convicted felons may be limited if there is a reasonable relationship between the restriction and the need to protect the public from the type of behavior for which the felon was convicted. *See United States v. Schiff*, 876 F.2d 272, 276 (2d Cir. 1989) (upholding a special condition of supervision that prohibited a convicted tax felon from advocating non-compliance with the tax laws). Moreover, many jurisdictions have laws that prohibit convicted felons from engaging in certain professions. *See, e.g.*, 12 U.S.C. § 1818(e) (permitting federal banking agencies to prohibit certain convicted felons from employment in a financial institution) (upheld in *Hudson v. United States*, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997)); 29 U.S.C. § 504(a) and the New York Waterfront Commission Act, § 8 (N.Y. Laws 1953, cc. 882, 883) (barring certain convicted felons from holding union office) (upheld in *De Veau v. Braisted*, 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960)); N.Y. Judiciary Law § 90(4)(a) ("Any person being an attorney . . . who shall be convicted of a felony . . . shall upon such conviction, cease to be an attorney."). Convicted felons also do not have a right to serve on a federal jury unless their civil rights have been restored. 18 U.S.C. § 1865(b)(5).

Similarly, the courts have recognized that the activities of convicted pedophiles may be subject to regulation in the interest of protecting children. *Paul P. v. Farmer*, 227 F.3d 98 (3d Cir. 2000); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999), *cert. denied*, 529 U.S. 1053, 120 S.Ct. 1554, 146 L.Ed.2d 460 (2000); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1191, 140

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[19] Generally such statutes must contain provisions for challenging an agency's determination and judicial review thereof. *See, e.g., Paul P. v. Farmer*, 227 F.3d 98, 100 (3d Cir. 2000); *Doe v. Pataki*, 120 F.3d 1263, 1270 (2d Cir. 1997).

L.Ed.2d 321 (1998); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122, 118 S.Ct. 1066, 140 L.Ed.2d 126 (1998) (all upholding "Megan's Law" type reporting and community notification statutes).[20] It also is worth noting that the Supreme Court has recognized that activity otherwise protected under the First Amendment may be limited in the interest of protecting children. *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 1396, 152 L.Ed.2d 403 (2002); *Reno v. ACLU*, 521 U.S. 844, 869, 117 S.Ct. 2329, 2343, 138 L.Ed.2d 874 (1997) ("[T]here is a compelling interest in protecting the physical and psychological well-being of minors which extend[s] to shielding them from indecent messages that are not obscene by adult standards."); *New York v. Ferber*, 458 U.S. 747, 756-57, 102 S.Ct. 3348, 3354, 73 L.Ed.2d 1113 (1982) ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling.. . . Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.")

Summary Judgment

Summary judgment is appropriate only where there is no genuine issue as to any material fact. *Koch v. Town of Brattleboro*, 287 F.3d 162, 165 (2d Cir. 2002). In this case, issues of fact remain as to the nature of specific areas within Playland Park. The Court has found that Playland is made up of a mixture of nonpublic and public fora. Because, as stated previously, the Defendants have simply taken the position that all areas are nonpublic fora, and Plaintiff has contended, to the contrary, that all areas are public fora, the parties have not focused on whether specific areas fall within

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[20] The significance of the fact that Mr. Hobbs' previous convictions were for misdemeanors, rather than felonies, would be weighed if and when the County adopts specific regulations that would require consideration of that issue.

one category or another. Therefore, the Court will hold a hearing at which the parties may present evidence about the physical characteristics and patterns of usage of those areas. For example, it may be appropriate to consider an area outside, but within a certain limited distance of the amusement area, to be nonpublic because of the interest in protecting the revenues of the concessionaires within the amusement area. The parties should also present evidence concerning the status of vendors along the boardwalk, if any, and the traffic flow in various park areas, picnic areas, and paths within Playland Park, or any other matter that they consider relevant to the determination of where, within the Park, Plaintiff has the right to perform his act.

Conclusion

For the foregoing reasons, the Court finds that Westchester County's refusal to grant Plaintiff a permit to perform his busking act in the amusement area within Playland Park is a reasonable time, place and manner restriction in a nonpublic forum. The Court finds, on the other hand, that Westchester County regulation § 765.41, which prohibits all solicitation in Westchester parks and recreational facilities, is overly broad and unconstitutional when applied to public forum areas. It also finds that Westchester County regulation § 765.261 cannot constitutionally be applied to preclude Plaintiff from performing his act in public forum areas within Playland Park. Similarly, the provisions of N.Y. Correction Law § 753 cannot be applied to preclude his request for a permit to exercise his First Amendment rights within public forum areas of Playland Park because the required analysis necessarily involves an improper exercise of discretion on the part of the licensing authority. Nevertheless, fact questions remain as to the extent of the public forum areas within Playland Park.

The Court will hold a conference with the parties on January 27, 2002, at 4:30 p.m., to determine how to proceed with respect to the issues remaining in this case.

SO ORDERED.

EXECUTIVE ORDER NO. 3-2003

WHEREAS, the County owns various facilities that are held in trust for the public and are considered to be public property for the enjoyment of adults and children alike; and

WHEREAS, the public nature of certain County facilities mandates that the County allow individuals to exercise their First Amendment rights on said public property; and

WHEREAS, the need for these restrictions is especially necessary when such First Amendment conduct that is performed on public property may attract crowds and children; and

WHEREAS, the exercise of a single individual's right under the First Amendment should not infringe upon another individual's enjoyment relating to the use of County property; and

WHEREAS, Section 110.11 of the Laws of Westchester County places the responsibility to supervise, direct and control, subject to law, the administrative services and departments of the county, upon the County Executive; and

WHEREAS, pursuant to Laws of Westchester County §712.291, I have the authority to issue permits for meetings and demonstrations held on County-Owned Property; and

WHEREAS, pursuant to Laws of Westchester County §712.291, I also have the authority to designate a representative to issue permits for meetings and demonstrations held on County-Owned Property and have exercised this authority via Executive Order, the most recent one of which is Executive Order No. 1-2003; and

WHEREAS, I have determined that it is in the best interests of the County to formally enact policies and procedures relating to the issuance of permits by my designated representatives in order to protect individuals who utilize County facilities; and

NOW THEREFORE, I, ANDREW J. SPANO, County Executive of the County of Westchester, in light of the

aforementioned and in accordance with my statutory duties, do hereof order that: (1) the following Permit Policy be implemented; (2) the policies and procedures set forth therein be complied with; (3) the County Permit Policy be posted at County facilities where applicable; and (4) the County's policy take effect immediately.

WESTCHESTER COUNTY PERMIT POLICY

I. Purpose.

This policy has been established to ensure reasonable restrictions on permits to solicit, perform, demonstrate or engage in other similar conduct utilizing props and/or equipment on Westchester County property that constitutes a public forum by limiting the time, place, and manner of such activity in order to assure a safe and secure environment for the protection of the public at large.

II. Application.

This policy shall apply to all individuals seeking to obtain a permit to solicit, perform, demonstrate, or engage in similar conduct utilizing props and/or equipment on public property owned by the County that is considered to be a public forum. These restrictions are being imposed for the safety of the public at large and to ensure their enjoyment of the County facilities. These restrictions are to be uniformly applied to all individuals regardless of the form of First Amendment expression and these restrictions shall not be utilized for the sole purpose of suppressing any individual's activity.

III. Designated Permit Zones.

On County public property that is deemed to be a public forum, there shall be a predetermined, designated zone where solicitation, performance, demonstration or other similar conduct utilizing props and/or equipment may be conducted. This permit zone shall be located in an area which shall minimize congestion or the obstruction of pathways, but shall also be situated in an area that is visible

and accessible to the general public. These permit zones are being created to give the County the ability to effectively monitor and coordinate permitting throughout the County. In addition, this permit zone will enable the County to safeguard the peace, good order and comfort of the general public. Within thirty (30) days of the execution of this Executive Order, these permit zones shall be designated by the County officer in charge of issuing permits in said area. The permit zones must also be sufficient in number and size so as to leave open ample channels of communication. Under no circumstances shall these permit zones prevent purely expressive conduct that is not more disruptive or substantial than the conduct normally engaged in by the general public in said location.

IV. Display of Permits.

All individuals that obtain a permit shall conspicuously display their permits at the location authorized by said permit for the solicitation, performance, demonstration or other similar conduct. The permit shall contain the name of the individual and/or the organization as appropriate, the type of activity authorized by the permit, the date, time and place restrictions and a telephone number for the public to utilize in order to comment about the conduct and/or activity of the permittee.

V. Permits Are Non-Transferable.

Permits issued to individuals to solicit, perform, demonstrate or any other similar activity are not transferable. Any permit that is being utilized by an individual and/or organization other than the person and/or organization authorized to utilize said permit shall be immediately revoked.

VI. Prohibition.

In accordance with guidelines set forth in Article 23-a of the New York State Correction Law, any individual seeking a permit that has been convicted of a crime may be denied a permit if it is determined that: (1) there is a direct

relationship between the criminal offense and the specific permit being sought; or (2) if the issuance of the permit would involve an unreasonable risk to property or safety or welfare of the general public.

Notwithstanding the aforementioned, no individual known to have been convicted of a sexual offense against a minor shall be permitted to obtain a permit if the solicitation, performance, demonstration or other similar activity would entice a child to congregate around that person since the granting of such a permit would involve an unreasonable risk to the safety and welfare of children.

VII. Revocation of Permit.

Any violation or non-adherence to the requirements of this Permit Policy may lead to the immediate revocation of the permit. The Department of Public Safety is also authorized to revoke a permit if the permitted activity: (i) presents a clear and present danger to the public safety, good order or health; (ii) interferes with ingress to or egress onto the County's property or otherwise violates the terms and conditions contained in the permit; or (iii) results in bodily harm to any individual, damage to property, or imminent breach of the peace such that good order cannot otherwise be maintained. A permit may also be revoked upon receipt of complaints regarding a particular permitee, and after a review by the County of the conduct being complained of, provided however, that the conduct being complained of, is not purely a matter of one's expression of his or her First Amendment rights.

VIII. Coordination of Efforts.

The Department of Public Safety, the Department of Parks, Recreation and Conservation and any other appropriate County Department shall work together in order to properly administer and effectuate the provisions of this Executive Order, including but not limited to, coordinating with state and local law enforcement agencies to review the

databases, as allowable under the law, that will assist in identifying known sexual offenders.

IX. S.E.Q.R.A. Determination.

In accordance with the requirements of the State Environmental Quality Review Act ("SEQRA"), the Westchester County Department of Planning has determined that this Executive Order which establishes a permit policy for the use of certain County property is a Type II action, pursuant to Parts 617.5(c)(15) and 617.5(c)(27) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("N.Y.C.R.R.") and therefore, that no further environmental review of this Executive Order is required.

X. Effective Date.

This Executive Order shall take effect immediately and shall remain in effect until otherwise superseded or revoked.

ANDREW J. SPANO,
County Executive

Dated: March 19, 2003
White Plains, New York